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90-451

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,

Petitioner,

v.

JUNE M. BETTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. Can an employer's treatment of an older employee that occurs after that employee voluntarily decides to retire due to reasons other than age constitute involuntary retirement because of age within the meaning of § 4(f)(2) of the Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(2)?

II. Is the holding below that the terms of a bona fide employee retirement plan may not provide for different retirement options for older and younger workers irreconcilable with this Court's decision in *Public Employees Retirement System of Ohio v. Betts*, ___ U.S. ___, 109 S. Ct. 2854 (1989)?

III. Where, pursuant to the terms of a bona fide employee retirement plan, younger employees are eligible for a retirement option that is not available to older workers, are older workers subjected to involuntary retirement because of age in violation of § 4(f)(2) of the Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(2)?

LIST OF PARTIES

The parties to the proceedings below were Petitioner Public Employees Retirement System of Ohio and Respondent June M. Betts. The Hamilton County Board of Mental Retardation and Developmental Disabilities ("HCB"), although a party to this action, has not participated actively since resolution in the courts below of issues unrelated to the questions presented in this petition. As a result, HCB is not named as a party herein.

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PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,

Petitioner,

v.

JUNE M. BETTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Public Employees Retirement System of Ohio respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on March 26, 1990. Rehearing was denied on June 12, 1990 (A-99).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit upon remand from this Court, issued March 26, 1990, (A-1), is not yet reported. The opinion of this Court reversing and remanding the judgment of the Sixth Circuit (A-18), is reported at ___ U.S. ___, 109 S. Ct. 2854. The initial opinion of the Sixth Circuit (A-59), is reported at 848 F.2d 692. The opinion of the United States District Court for the Southern District of Ohio, Western Division (A-81), is reported at 631 F. Supp. 1198.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered on March 26, 1990. Rehearing was denied on June 12, 1990. The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

29 U.S.C. Section 623(a) provides:

> (a) It shall be unlawful for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. Section 623(f)(2) provides:

> (f) It shall not be unlawful for an employer, employment agency, or labor organization –
>
> * * *
>
> (2) to observe the terms of a bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual. . . .

Ohio Rev. Code Section 145.35 provides in relevant part:

> Application for disability retirement may be made by a member or by a person acting in his

behalf, or by the member's employer provided the member has not attained age sixty, is not receiving disability benefits under any other Ohio state or municipal retirement program, and either has at least five years of total service credit or, regardless of length of service, is a law enforcement officer disabled by an on-duty illness or injury.

* * *

Medical examination of a member who has applied shall be conducted by a competent disinterested physician or physicians selected by the board to determine whether the member is mentally or physically incapacitated for the performance of duty by a disabling condition either permanent or presumed to be permanent. . . .

Ohio Rev. Code Section 145.39 provides in relevant part:

A disability retirant shall retain his membership status. Also, he shall be considered on leave of absence from his position of employment during his first five years on the retired list, notwithstanding any contrary provisions in this chapter. The public employees retirement board may require any disability retirant to undergo a medical examination. If any disability retirant refuses to submit to a medical examination, his retirement allowance shall be discontinued until his withdrawal of the refusal. Should the refusal continue for one year, all his rights in and to such retirement allowance shall be forfeited. Upon completion of the examination by an examining physician or physicians selected by the board, the physician or physicians shall report and certify to the board whether the retirant is physically and mentally capable of resuming service similar to that from which he was retired. If the board concurs in the report that the disability retirant is capable of

> resuming service similar to that from which he was retired, the payment of the disability allowance shall be terminated not later than three months after such determination or upon employment as a public employee. If the leave of absence has not expired, the retirement board shall certify to his last employer before retirement that the retirant is capable of resuming service and the employer shall restore the retirant to his previous position and salary or to a position and salary similar thereto. . . .

STATEMENT OF THE CASE

This case is no stranger to the Court. *See Public Employees Retirement System of Ohio v. Betts*, ___ U.S. ___, 109 S. Ct. 2854 (1989) ("*PERS v. Betts*") (A-18). Respondent June Betts ("Respondent") is a former employee of the Hamilton County Board of Mental Retardation and Developmental Disabilities. In 1985, at the age of 61, deteriorating health made it impossible for her to continue to work. *Id.* at 2858-59 (A-20).

As further noted in this Court's rendition of the facts in *PERS v. Betts*,

> [Betts] was given the choice of retiring or undergoing medical testing to determine whether she should be placed on unpaid medical leave. She chose to retire, an option which gave her eligibility for age-and-service retirement benefits from PERS. Because she was over 60 at the time of retirement, however, appellee was denied disability retirement benefits, despite her medical condition.

* * *

[Betts] filed an age discrimination charge against PERS with the [Equal Employment Opportunity Commission], and filed suit in the United States District Court for the Southern District of Ohio, claiming that PERS' refusal to grant her application for disability retirement benefits violated the [Age Discrimination in Employment Act ("ADEA")]. The District Court found that PERS' retirement scheme was discriminatory on its face, in that it denied disability retirement benefits to certain employees on account of their age. The court rejected PERS' reliance on § 4(f)(2) of the ADEA, which exempts from the Act's prohibitions certain actions taken in observance of "the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [the Act]. . . . " 29 U.S.C. § 623(f)(2). Relying on interpretive regulations promulgated by the EEOC, the District Court held that employee benefit plans qualify for the § 4(f)(2) exemption only if any age-related reductions in employee benefits are justified by the increased cost of providing those benefits to older employees. Because the PERS plan provided for a reduction in available benefits at age 60, a reduction not shown to be justified by consideration of increased cost, the court concluded that PERS' plan was not entitled to claim the protection of the § 4(f)(2) exemption.

* * *

A divided panel of the Court of Appeals affirmed. 848 F.2d 692 (CA6 1988). The majority agreed with the District Court that the § 4(f)(2) exemption is available only to those retirement plans that can provide age-related cost justifications or "a substantial business purpose" for

> any age-based reduction in benefits. *Id.* at 694. . . . Judge Wellford dissented.

PERS v. Betts, 109 S. Ct. at 2859-60 (A-20-22).

This Court reversed the decision of the court of appeals. By a vote of 7-2, the age-related cost theory was rejected. The Court held that PERS' denial of disability retirement benefits to older workers was not a "subterfuge to evade the purposes of the [ADEA]" unless Respondent could prove "that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relation." *PERS v. Betts*, 109 S. Ct. at 2868 (A-42). The case was remanded to permit Respondent to present evidence on the subterfuge question and for the Sixth Circuit to review the district court's alternative ground for invalidating PERS' plan, a ground previously unaddressed by the court of appeals, that the denial of disability retirement benefits resulted in the age-based involuntary retirement of Respondent in violation of § 4(f)(2). *Id.* at 2860 n. 2 (A-24).

On remand, the same panel of the Sixth Circuit, with Judge Wellford once again dissenting, concluded that Respondent had been involuntarily retired because of age when she chose to retire because of poor health and, subsequent to her decision to retire, was denied disability retirement benefits:

> While it is true that retiring for health reasons is not actionable, Betts is claiming that she was denied one of the three options available to PERS employees *because of her age*. Even though she retired for health reasons, she was not given the choice of disability benefits solely because of

> her age. This denial, not her initial retirement, is what makes the § 4(f)(2) defense inapplicable.

Betts v. Hamilton County Board of Mental Retardation and Developmental Disabilities ("*Betts*"), Case Nos. 86-3676/4034 (6th Cir. March 26, 1990) (emphasis in original) (A-7).

The panel majority was "strongly influenced," *see Betts*, slip op. at 4 (A-4), by the Court's opinion in *Trans World Air Lines v. Thurston*, 469 U.S. 111 (1985). *Thurston* involved the interaction of a Federal Aeronautics Administration regulation requiring able-bodied persons age 60 and over to cease serving as pilots and TWA's policy requiring these displaced pilots to retire unless, prior to turning 60, they could "bump" less senior flight engineers. *Thurston*, 469 U.S. at 115-16. The Court held that TWA's policy of retiring older pilots who were unsuccessful in their efforts to replace flight engineers denied older workers a "privilege of employment," *id.* at 120, and consequently "permitted" involuntary retirement because of age in violation of § 4(f)(2). *Id.* at 124.

The panel majority below analogized the denial of disability retirement benefits under PERS to TWA's policy of bump or retire, characterizing the denial of a retirement benefit as "at the very least a 'privilege of employment' or an 'employment opportunity' under § 4(a)(1), if not a job." *Betts*, slip op. at 5 (A-5-6). Although the panel majority acknowledged that Respondent retired for "health reasons," it concluded that she was the victim of "*after-retirement* discrimination" when she was "forced involuntarily into a less desirable retirement program on the basis of age." *Betts*, slip op. at 6 (A-7) (emphasis added).

In his dissent, Judge Wellford stated that Respondent was compelled to discontinue working "not by reason of what . . . [her] employer did or did not do, not by reason of age, but by reason of her own health problems." *Betts*, slip op. at 9 (A-10). The panel majority was criticized for relying on *Thurston* because *Thurston* involved "a pilot over 60 years of age *who was capable and desired to continue working*," *Id.*, slip op. at 11 (A-12) (emphasis in original), who was prevented from doing so by his employer's policy. On the other hand, "no one *forced* Betts to stop working." *Id.*, slip op. at 13 (A-14) (emphasis in original).

In short, according to Judge Wellford, "Betts was not forced to retire because of her age; rather, she elected to retire, for health reasons, to receive retirement benefits. . . . There was no compulsory retirement forced upon an employee who desired to, or was capable of, continuing to work." *Id.*, slip op. at 14 (A-16).

PERS subsequently filed a timely petition for rehearing and also suggested that the case be reheard *en banc*. Both requests were denied pursuant to the appellate court's order issued on June 12, 1990 (A-99).

REASONS FOR GRANTING THE WRIT

The same two judges of the Sixth Circuit whose judgment was reversed earlier in this case have decided on remand that a retirement plan that provides less desirable benefits to older workers requires or permits involuntary retirement because of age within the meaning of § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2). By holding that "after-retirement" treatment of older workers can constitute

involuntary retirement, the court below severely reduced the significance of this Court's decision in *PERS v. Betts*, misinterpreted § 4(f)(2), dramatically increased the prospect of employer liability under the ADEA, and in the process, placed itself at odds with several other circuit courts. Accordingly, this Court's full review is warranted. Indeed, because the error in the Sixth Circuit's decision is manifest, PERS suggests that the judgment below be reversed summarily.

1. § 4(f)(2) of the ADEA provides that an employer acts within the law if he "observes the terms of a bona fide employee . . . retirement . . . plan . . . which is not a subterfuge to evade the purposes of" the ADEA. 29 U.S.C. § 623(f)(2). This Court's decision in *Betts* makes it clear that

> when an employee seeks to challenge a benefit plan provision as a subterfuge to evade the purposes of the Act, the employee bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relation.

PERS v. Betts, 109 S. Ct. at 2868.[1]

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[1] As the Court probably is aware, legislation has been introduced in Congress designed to reverse the effect of *PERS v. Betts*. This legislation, in one form or another, has been under consideration for almost a year, with no indication when, or if, it will pass. Regardless of whether a law affecting *PERS v. Betts* eventually comes to fruition, it almost certainly will not address the question of what constitutes involuntary retirement pursuant to § 4(f)(2). The prospect of legislative change, therefore, should not interfere with the decision to grant certiorari in this case.

In addition to prohibiting employers from utilizing retirement and other employee benefit plan provisions as subterfuges to evade the ADEA, § 4(f)(2) makes it illegal for any employee benefit plan to "require or permit . . . involuntary retirement . . . because of age. . . . " 29 U.S.C. § 623(f)(2). Unless one chooses to read the proscriptions on "subterfuge" and "involuntary retirement" as redundancies, Congress must have intended the latter term to apply to different employer conduct than the former.

The panel majority below acknowledged that Respondent retired because of health. *See Betts*, slip op. at 6 (A-7). That fact notwithstanding, it concluded that Respondent was the victim of involuntary retirement within the meaning of § 4(f)(2) because she was "forced . . . involuntarily into [a] less desirable retirement" program because of age. *Betts*, slip op. at 7 (A-7).

The unmistakable essence of this Court's decision in *PERS v. Betts*, however, is that older workers may be placed in less desirable retirement programs. The lower court's holding, therefore, creates a perplexing situation for employers: pursuant to this Court's decision in *PERS v. Betts*, it is legal to provide less desirable retirement benefits to older workers; nevertheless, in the eyes of the panel majority below, providing less desirable retirement benefits to older workers subjects them to illegal involuntary retirement because of age.

The preceding discussion reveals the inherent conflict between the Sixth Circuit's notion that "after-retirement discrimination" constitutes involuntary retirement, slip op. at 6 (A-7), and this Court's holding in *PERS v. Betts*. The question in *PERS v. Betts* was whether, under

§ 4(f)(2), PERS could offer a different retirement option to Respondent. The Court answered in the affirmative, provided no subterfuge was involved. Yet, the Sixth Circuit's holding contravenes this Court's decision by eliminating from the scope of the § 4(f)(2) exemption what must be the most common kind of different treatment in which a retirement plan can engage – "after-retirement" treatment.

In an attempt to buttress its conclusion that "after-retirement discrimination" is the equivalent of involuntary retirement, the panel majority below alluded to the fact that "[t]he third option of disability benefits which Betts was not offered is similar to a job since she would have been able to return to work had her condition improved." *Betts*, slip. op. at 5 (A-6). This is in reference to a provision in Ohio law since 1933, brought to the Court's attention in *PERS v. Betts*, *see* 109 S. Ct. at 2858 (A-19), that permits a PERS disability retirant to return to work if during the first five years of retirement his health improves sufficiently to make the return to work possible. *See* Ohio Rev. Code § 145.39.[2] This provision, however, did not require or permit the involuntary retirement of Respondent.

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[2] The Sixth Circuit's decision reflects a major misreading of Ohio Rev. Code § 145.39. On page 3 of its opinion, the lower court noted that "[a]s a disability retiree, rather than a length-of-service retiree, Betts would have remained an employee of Hamilton County and would have been entitled to return to work had her condition improved" (A-3). While it is true that a disability retirant remains a *member* of PERS, he does *not* retain his status as an employee. *See* Ohio Rev. Code § 145.39.

First, one must retire *before* becoming eligible for this benefit. Second, because one must be permanently disabled in order to qualify for disability retirement benefits, *see* Ohio Rev. Code § 145.35, the presumption is that the disability retirant will never return to work. Third, the effective date of Respondent's retirement was August 1, 1985, more than five years ago. There was no suggestion at any time during the first five years of her retirement that Respondent was capable of returning to work. In fact, it is PERS' understanding that Respondent remains incapacitated because of poor health. As a result, Respondent never could have taken advantage of this provision. Finally, one of the options available to Respondent, unpaid medical leave, provided her with up to six months to reclaim her former job and, therefore, gave her a right to return to work.

The ramifications of the Sixth Circuit's judgment are unacceptable. The decision of the panel majority below nullifies this Court's decision in *PERS v. Betts* by condemning employer conduct – placement of older workers in different retirement programs – already deemed legal in this case. In effect, the decision below makes pension and retirement systems ineligible for the protection of the § 4(f)(2) exemption except in the most narrow of circumstances.

The court below has ignored the instructions of this Court concerning the scope of § 4(f)(2). Because the lower court failed to consider controlling law in respect to an important piece of legislation and deprived PERS of the judgment it already has secured from this Court, it is urged that the judgment below be reversed summarily.

2. This case also is worthy of the Court's plenary review because it presents the Court with the opportunity to complete its consideration of § 4(f)(2), the focal point of much litigation. The facts of this case reveal that Respondent was never confronted with a choice of discharge because of age or retirement because of age. Rather, she was confronted with the prospect of age-neutral unpaid medical leave or age-and-service retirement with income and paid health care coverage. While it may be true that Respondent was asked to make a difficult choice, it does not necessarily follow that the choice was illegal. The decision below, therefore, raises the question of the scope of the involuntary retirement prong of § 4(f)(2).

The Court has visited only once the issue of what constitutes involuntary retirement because of age within the meaning of the ADEA. *See Trans World Air Lines v. Thurston*, 469 U.S. 111 (1985). In *Thurston*, a case that "strongly influenced" the panel majority below, *Betts*, slip op. at 4 (A-4), the Court was concerned with an employer's written policy making it mandatory for able-bodied pilots to retire unless, before they reached age 60, they could supplant, or "bump," less senior flight engineers. *Thurston*, 469 U.S. at 116. In contrast, the case at bar involves 1) an employee unable to continue working because of poor health, 2) a retirement plan that has no written provision that "require[s] or permit[s] involuntary retirement because of age," and 3) facts representative of what even the lower court characterized as "*after-retirement* discrimination." *Betts*, slip op. at 6 (A-7) (emphasis added).

It is apparent that the Sixth Circuit's opinion represents a dramatic departure from *Thurston's* interpretation of what constitutes prohibited age-based involuntary retirement within the meaning of § 4(f)(2). Unlike *Thurston*, the lower court's judgment proscribes employer conduct that occurs *after* an employee chooses to retire under the terms of a retirement plan that gives the employer no authority whatever to utilize age as the basis for terminating employment. The Sixth Circuit's decision, therefore, significantly increases employers' exposure to liability under the ADEA. Thus, this case continues to present an issue of national importance that has not been, but should be, settled by this Court.

3. An additional reason for granting PERS' petition for a writ of certiorari is that the decision below is in conflict with decisions from the First and Third Circuits and conflicts in principle with a decision from the Seventh Circuit. *See Equal Employment Opportunity Commission v. State of Maine*, 644 F. Supp. 223 (D. Me. 1986), *aff'd mem.*, 823 F.2d 542 (1st Cir. 1987); *Equal Employment Opportunity Commission v. Westinghouse Electric Corporation*, Case No. 86-1226 (3d Cir. July 5, 1990); *Henn v. National Geographic Society*, 819 F.2d 824 (7th Cir.), *cert. denied*, 484 U.S. 964 (1987). As in the case at bar, *Maine* involved a provision in a retirement plan dealing with the treatment of disabled workers. The State of Maine offered disability retirement benefits to employees under age 60, but made employees over age 60 eligible only for age and service retirement benefits. The district court scrutinized Maine's policy under both the subterfuge and involuntary retirement prongs of § 4(f)(2) and concluded that Maine's retirement plan was in compliance with the law.

In particular, the court determined that Maine's plan "does not require mandatory retirement for any employee. Instead, [Maine] offers a variety of retirement plan benefits to permanently disabled workers." *Maine*, 644 F.Supp. at 227. The First Circuit affirmed in its entirety the district court's judgment. With its decision in this case, therefore, the Sixth Circuit has aligned itself in opposition to the position adopted by another court of appeals.

In *Westinghouse*, the Third Circuit examined, among other things, the relationship of the employer's severance pay and lay-off policies to involuntary retirement because of age. Younger employees who were laid-off were eligible for severance pay. Retirement-eligible employees, however, were denied severance pay. Because older workers who chose to go on lay-off status were left without income, the EEOC, plaintiff in *Westinghouse*, argued that "the options available under the [lay-off/severance pay] plans left retirement-eligible employees with no real choice other than retirement, and that this amounted to constructive discharge." *Westinghouse*, slip op. at 19 (A-119).

Notwithstanding the EEOC's argument, the Third Circuit determined that Congress did not intend

> Section 4(f)(2) to reach circumstances like these where laid-off employees had the option to forego retirement and remain with the company on lay-off while awaiting recall. . . . Section 4(f)(2) proscribes the use of employee benefit plans as a means of forcing older workers off the job. . . . *The choice between retirement and unpaid layoff does not constitute involuntary retirement where, as here, continued work was not an*

> *option for any of the affected employees, and the employee's layoff status was unrelated to age. . . . Nor do we believe that exclusion from the severance plan caused older employees to retire. Those who retired did so because they were laid off.*

Westinghouse, slip op. at 19-20 (A-119-21) (footnotes omitted) (emphasis added).

In the case at bar, Respondent was suffering from failing health. Continued employment was not an option for her. She had the choice of going on age-neutral unpaid medical leave or age and service retirement. Had she decided not to retire, her status on unpaid medical leave would have been "unrelated to age." *Id.* Nevertheless, the Sixth Circuit reached a different conclusion than the one reached by the Third Circuit in *Westinghouse*.

Henn involved an instance of early retirement. According to the Seventh Circuit, the crucial question in determining if a retirement is legal is whether the employer requires an employee to choose between retirement and "existing conditions . . . [that] violate the ADEA." *Henn*, 819 F.2d at 829. Where an employee must choose between two options, "one [age-]neutral, one beneficial [by comparison]," the employee has not been involuntarily retired because of age. *Henn*, 819 F.2d at 828. Phrased differently, an employee is not involuntarily retired because of age if he "would [not] have been fired (in violation of the ADEA) had [he] turned down the offer of . . . retirement." *Henn*, 819 F.2d at 830.

In the instant case, Respondent could no longer work because of her health. Her employer was legally entitled to place her on unpaid medical leave without health coverage. As an alternative, she was eligible for age and

service retirement benefits which included a monthly pension and health coverage. Thus, Respondent was required to choose between an age-neutral option, unpaid medical leave, and an option that was beneficial in comparison, age and service retirement. She would not have been fired in violation of the ADEA had she chosen not to retire. Unlike the Seventh Circuit in *Henn*, however, the court below held that the employer conduct involved was illegal.

The Sixth Circuit's interpretation of involuntary retirement within the meaning of § 4(f)(2) deviates from the interpretation of the statute rendered by other circuit courts. In light of the discordant opinions issued by the First, Third, Sixth, and Seventh Circuits, this case presents the Court with the opportunity to resolve a conflict between the courts of appeals that is "sufficiently crystallized to warrant certiorari if the federal law is to be maintained in any satisfactory uniform condition." *Beaulieu v. United States*, ___ U.S. ___, 58 U.S.L.W. 3834 (June 26, 1990) (White, J., dissenting from denial of petition for certiorari).

CONCLUSION

For all the preceding reasons, the Court is urged to grant the writ of certiorari sought by Petitioner.

Respectfully submitted,

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September 1990

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*The opinions in the appendix have been reproduced verbatim, including any typographical errors.

RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

Nos. 86-3676 and 86-4034

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUNE M. BETTS, Plaintiff-Appellee, v. HAMILTON COUNTY BOARD OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES AND PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO, Defendants-Appellants.	)	ON REMAND from the United States Supreme Court

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Decided and Filed March 26, 1990

BEFORE: MERRITT, Chief Judge; MARTIN and WELLFORD, Circuit Judges.

MERRITT, Chief Judge, delivered the opinion of the court in which MARTIN, Circuit Judge, joined. WELLFORD, Circuit Judge, (pp. 8-15) delivered a separate dissenting opinion.

MERRITT, Chief Judge. This federal age discrimination case has a complicated history and is now before this Court upon remand from the Supreme Court. *Public Employees Retirement System of Ohio v. Betts*, 109 S. Ct. 2854 (1989), reversing, 848 F.2d 692 (6th Cir. 1988), *affirming*,

631 F. Supp. 1198 (S.D. Ohio 1986). We conclude that the defendant subjected plaintiff to "involuntary retirement" in violation of §§ 4(a)(1) and 4(f)(2) of the Age Discrimination in Employment Act. 29 U.S.C. §§ 623(a)(1), 623(f)(2).

Section 4(a)(1) makes it unlawful for an employer "to discharge" an employee or "otherwise discriminate" on the basis of age in respect to the employee's "compensation, terms, conditions or privileges of employment," including any actions which "tend to deprive any individual of employment opportunities or otherwise adversely affect his status." 29 U.S.C. § 623(a).

Congress created a partial exception to this general standard for bona fide employee benefit plans. § 4(f)(2) allows age discrimination by an employer in order "to observe the terms of . . . any bona fide employee benefit plan such as a retirement . . . plan . . . except that . . . no such . . . plan shall require or permit the involuntary retirement of any individual . . . because of age. . . . " 29 U.S.C. § 623(f)(2).[1] The Supreme Court has now held that

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[1] Section 623(f)(2) provides in full:

It shall not be unlawful for an employer, employment agency, or labor organization –

> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, no such seniority system or employee benefit plan shall

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the Ohio Retirement Plan is the type of "bona fide" plan subject to the § 4(f)(2) partial exemption, and we must now decide whether Betts was "involuntarily retired," thereby making the exemption inapplicable.

Betts worked as a speech pathologist for the Hamilton County Board of Mental Retardation and Developmental Disabilities for five years. After Betts became ill, the Board determined that she could no longer perform her job. In 1985, when Betts was 61 years of age, her supervisor told her that under Ohio law she had only two possible alternatives: an unpaid medical leave, which would not entitle her to any benefits, or a length-of-service retirement, which would entitle her to $158.50 a month. Ohio Rev. Code §§ 195.32 and 145.301(c). Had she been under 60, the Ohio plan would have given Betts a third option: disability benefits with the possibility of being recalled if her condition sufficiently improved. Ohio Rev. Code § 145.39. Under this third option she would have been entitled to $355.02 a month. As a disability retiree, rather than a length-of-service retiree, Betts would have remained an employee of Hamilton County and would have been entitled to return to work had her condition improved. She was denied this alternative because of her age. Faced with the two choices put to her, she chose the length-of-service retirement.

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require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual. . . .

29 U.S.C. Section 623(f)(2).

The Supreme Court remanded to us the issue of "involuntary retirement" under § 4(f)(2) using the following language:

> As a result of the 1978 amendments, § 4(f)(2) cannot be used to justify forced retirement on account of age. Appellee contends, and the District Court found, that appellee was forced to retire under the terms of PERS' plan, and that as a result § 4(f)(2) is unavailable to PERS. The Court of Appeals did not address this question, and we express no opinion on it, leaving its resolution to that court on remand.

Betts, 109 S. Ct. at 2860 n.2. More specifically, the question presented is: When an employer forces an employee to retire because of job performance or some other legitimate reason not based on age, and then forces the employee into a less desirable retirement plan because of age, does the employer's conduct constitute "involuntary retirement . . . because of age" in violation of § 4(f)(2)? Or, put another way, when an employer forces terms of retirement on an employee for mixed reasons, one of which is age, does the employer violate the "involuntary retirement" proviso of § 4(f)(2) and make the "bona fide" retirement plan exemption unavailable?

Our decision for the employee in this case is strongly influenced by a decision in the Supreme Court and a prior decision in this Court, both of which we regard as on point. The Supreme Court considered a similar issue of "involuntary retirement" in *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985), in which the airline asserted the "bona fide" retirement plan defense. In *Thurston*, TWA had two related retirement policies for pilots:

(1) For safety reasons, pilots could no longer serve after age 60 but had to retire as pilots, a policy the pilots conceded to be valid as a bona fide occupational qualification under § 4(f)(1).

(2) Flight engineers could serve beyond age 60, and pilots who became unable to fly could become flight engineers by displacing or "bumping" less senior flight engineers. This "bumping" rule applied, however, only to pilots under age 60.

The Supreme Court held that the § 4(f)(2) "bona fide" retirement plan defense was unavailable because the retired pilots were denied a "privilege of employment" – the right to "bump" into the job of flight engineer – on account of age. *Thurston*, 469 U.S. at 124. It concluded that "because captains disqualified for reasons other than age are allowed to 'bump' less senior flight engineers, the mandatory retirement was age-based. Therefore, the 'bona fide seniority system' defense is unavailable to the petitioners." *Id.* As in the present case, the employer had two policies related to retirement, one valid and the other invalid. The initial retirement was valid, as in the present case, but the age-based refusal to allow the employee to participate in a further reemployment opportunity made the § 4(f)(2) defense unavailable.

Thurston therefore is on point. Because of their age, some TWA pilots were not entitled to "bumping" privileges. Because of her age, plaintiff was not entitled to disability benefits. Defendant argues that Betts' situation is distinguishable because none of the three options available to her would have been another job as was the case in *Thurston*. The benefits she was denied, however, were at the very least a "privilege of employment" or an

"employment opportunity" under § 4(a)(1), if not a job. Moreover, the third option of disability benefits which Betts was not offered is similar to a job since she would have been able to return to work had her condition improved.

This Court's decision in *EEOC v. Chrysler*, 733 F.2d 1183, *reh'g en banc denied*, 738 F.2d 167 (1984), is also on point. In *Chrysler* the company instituted a retirement plan in an attempt to overcome potential insolvency. As a matter of "business necessity," fifty employees over the age of 55 were given retirement benefits under a special early retirement "program." Although these employees were given the same retirement pay as those who had voluntarily accepted early retirement, they were not given the option of taking "layoff status," thereby allowing return to work on a seniority basis, which had been provided to those under 55 who were laid off.

We held that the plan as instituted constituted "involuntary retirement" making the § 4(f)(2) defense unavailable. The Court rejected Chrysler's argument that because both age and economics were factors in that decision the plan should receive the § 4(f)(2) exemption. *Chrysler*, 733 F.2d at 1185. Because age was an invalid "determining" factor on one term or condition of the retirement plan, specifically the failure to allow return to work on the basis of seniority, the plan violated the ADEA and was not subject to the exemption. *Id.* at 1186.

Like *Thurston*, *Chrysler* is analogous to this case. The *Chrysler* workers, both young and old, were laid off because of "business necessity." But, purely because of their age, older workers were denied the option of layoff

status. Betts' situation is similar. She was denied the third option of disability benefits solely because of her age. Thus, similarly situated people under 60 would have been entitled to disability benefits. If Betts had been 59 and had retired because of an illness, she would have been entitled to that third option. This after-retirement discrimination based on age was condemned by the *Chrysler* court. It made the § 4(f)(2) exemption unavailable there, and for the same reason it should be unavailable here.

Defendant relies on two cases from the Seventh Circuit to bolster their argument that Betts was not involuntarily retired. Defendant quotes language from *Weihaupt v. American Medical Ass'n*, 874 F.2d 419 (7th Cir. 1989): "A discharge based on health is not actionable under the ADEA." *Weihaupt*, 874 F.2d at 425. We have no quarrel with that principle, but Betts' situation is entirely different from the situation in *Weihaupt*. In that case plaintiff was not forced to retire or forced involuntarily into a less desirable retirement program on the basis of age. While it is true that retiring for health reasons is not actionable, Betts is claiming that she was denied one of the three options available to PERS employees *because of her age*. Even though she retired for health reasons, she was not given the choice of disability benefits solely because of her age. This denial, not her initial retirement, is what makes the § 4(f)(2) defense inapplicable.

Defendant's reliance on language from *Henn v. National Geographic Society*, 819 F.2d 824 (7th Cir. 1987), an early retirement case, is also misplaced. The Seventh Circuit held that an inference of age discrimination was not supported when two factors, one neutral, retirement, and

one beneficial to the older employee, incentives, were present. *Henn*, 819 F.2d at 828. Betts, an older employee, was not given any choice of incentives. Quite the contrary: she was denied the choice of disability benefits which would have been available to her had she been one year younger.

This decision should not be read to undercut a company's ability to institute early retirement plans or require retirement for reasons of health or job performance. However, we follow the principle established by *Thurston* and *Chrysler* that in administering retirement plans employers may not force older workers involuntarily into less desirable retirement programs on the basis of age. Such coercive conduct constitutes "involuntary retirement" under § 4(f)(2).

Accordingly, the judgment of the District Court is AFFIRMED.

WELLFORD, Circuit Judge, dissenting:

The Supreme Court reversed our prior decision in this difficult case and "remanded for further proceedings consistent" with its opinion. *Public Employees Retirement System of Ohio v. Betts*, 109 S. Ct. 2854, 2869 (1989). The dissenters viewed the majority decision with alarm feeling that it "immunizes virtually all employee benefit programs from liability" under ADEA. 109 S. Ct. at 2869. A majority of our panel, however, does not "immunize,"

under a § 4(f)(2) exemption, the employee benefit program in controversy from liability to Betts.[1]

The majority of the panel of this court on remand, moreover, interprets § 4(f)(2) in such a manner as to find in violation of the act the terms of a "bona fide employee benefit plan" of PERS which was not a "subterfuge" to evade its purposes. It construes what appears to the writer to be the voluntary action of a person not physically capable of carrying out the duties of her job to be an "involuntary retirement" by the Ohio Board, thus holding the PERS plan not to be subject to the exemption of § 4(f)(2).

The first question in this case was settled by the Supreme Court in *Betts*: "PERS is entitled to the protection of the § 4(f)(2) exemption unless its plan is 'a subterfuge to evade the purposes of' the Act." 109 S. Ct. at 2860 (footnote omitted). The Court found the plan in this case not to be a subterfuge. It is also true that the Court, at the same time, expressed no opinion on whether or not Betts "was forced to retire under the terms of the PERS plan," and left its resolution to be determined on remand. *Id.* at 2868-69. It seems to me that this remand involves both a factual question and a legal question. To decide whether a person was *forced to retire*, a court must first determine the factual predicates for such a decision. Thus, based on

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[1] Mr. Justice Marshall, in dissent, stated, moreover, "Henceforth, liability will not attach under the ADEA even if an employer is unable to put forth any justification for denying older workers the benefits younger ones receive. . . . " 109 S. Ct. at 2869.

the facts found, a court must then reach a legal conclusion on "involuntary retirement." It may be that the district court is the appropriate tribunal to make that first determination in light of the principles expressed by the Supreme Court. In any event, on remand we must consider a mixed question of fact and of law: was there a forced retirement?

The majority, moreover, mistakenly poses a question which it already answers in the form of the question:

> . . . the question presented is: when an employer *forces terms of retirement* on an employee for mixed reasons, one of which is age, does the employer violate the "involuntary retirement" proviso of § 4(f)(2) . . . ?

(Emphasis added). The assumption made in the question presented by the majority is that defendant employer *forced* Betts into retirement.[2] But, the proper question is: did the defendant employer force Betts into retiring, or did she retire essentially because her health required her to quit? I submit that, if called upon to answer that question, the facts would clearly indicate the latter: Betts was compelled to resign, not by reason of what the employer did or did not do, not by reason of her age, but by reason of her own health problems.

The only case law authority upon which the district court found that Betts "was forced into retirement

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[2] This is, as the Supreme Court clearly put it: "Appellee [Betts] contends, and the District Court found, that appellee was *forced to retire*. . . . " 109 S. Ct. at 2860 n.2. (emphasis added). We did not previously address this question, and, of course, we should not assume that the district court was correct.

because of her age" was *Jacobs v. Martin Sweets Co., Inc.*, 550 F.2d 364 (6th Cir.), *cert. denied*, 431 U.S. 917 (1977), and *EEOC v. Chrysler Corp.*, 733 F.2d 1183 (6th Cir. 1984). The district court stated that: "[T]he amendment to ADEA . . . in essence overruled the Supreme Court's decision in *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977). . . . " The latter proposition is clearly in error in light of the Supreme Court decision in *Betts* (*EEOC v. Chrysler*, also relied upon by the district court, was effectually overruled by *Betts*). *Jacobs* involved a sex discrimination claim of constructive discharge of an unmarried plaintiff by reason of her pregnancy. Here, again, Jacobs was willing and anxious to continue working, a situation entirely different from Betts'. The complaint in *Jacobs*, in contrast to Betts', was that plaintiff was discriminatorily, by reason of her sex, precluded from working – a world apart from the factual situation in the present controversy.

Jacobs was cited by the district court because he found the "situation analogous to constructive discharge," an issue in that case. The basis for constructive discharge, however, in *Jacobs* was the employer's attitude and actions towards the plaintiff because she was unmarried. Ordinarily, where workers were pregnant, "the Company allowed such employees to work as long as they were able, consistent with their health." 550 F.2d 364. The defendants in this case treated plaintiff no differently from others in her same classification who retired because of health.

There is simply no proper analogy between *Jacobs* and this case. *Jacobs* is not authority for the district court's conclusion that there was a "forced retirement" of

Betts. The *Chrysler* case, relied upon both by the district court and the majority, is also not a basis for holding that Betts was forced to retire and/or that the Ohio Board or PERS acted in derogation of ADEA with respect to Betts' choice of options available to her by reason of failing health. The district court, therefore, was clearly erroneous in the basis for deciding that Betts was forced to retire.

The majority is also in error in describing the "medical leave" option as providing plaintiff with no "benefits." To the contrary, it would enable plaintiff to maintain her position, or a right to continue employment, if Betts' health improved and permitted her to do so. Although an unlikely prospect, the majority thought that the entitlement "to return to work had her condition improved" an important alternative, an "employment opportunity" considered in the context of an option available to other employees. Thus, the majority is inconsistent in its consideration and treatment of the options made available to Betts, who herself realized that she could no longer work due to her health, and faced the prospect of termination.

The majority's decision that Betts was forced to retire because of age is "strongly influenced" by *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). *Thurston*, however, involved an entirely different issue: whether a pilot over 60 years of age *who was capable and desired to continue working* could be discriminated against and denied that opportunity when other similarly capable and desiring pilots, disqualified for some physical reason from piloting (not age), were permitted to continue working. *Thurston* involved an age discrimination action by an employee which precluded a willing 60 year old (or older) pilot from continuing to work. The instant case, on

the other hand, involves the situation in which the employer was, for a considerable period of time, willing to accommodate an employee handicapped by a disability and was willing to allow her to continue to work, taking into account her health, but she became incapable of continuing to work. *Thurston*, then, involves a fundamentally different situation from the one at hand. To compare the retirement in *Thurston* with the Betts retirement is to compare apples and oranges.

The majority discussed the options available to Betts and stated "the third option of disability benefits which Betts was not offered is similar to a job since she would have been able to return to work had her condition improved."[3] The record is clear in this case that Betts could not continue working. Her doctor filed a report, as noted by the district court, that she was *permanently disabled*, and she has never denied this status since her decision to retire. The majority's reference to a "third option" is irrelevant in my view to the extent it takes into account Betts' potential of returning to work. She had an option of undergoing a medical examination, and if found disabled, to take medical leave with the option of returning to her job without the loss of benefits *when she returned*. I disagree with my colleagues that Betts was denied any "employment opportunity" under the factual circumstances of this case.

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[3] Presumably, the other options offered Betts were a medical leave, which would make her eligible to return when able to do so, but without pay during the interim, or "voluntary retirement," the option chosen by Betts.

Neither do I find *EEOC v. Chrysler Corp.*, 733 F.2d 1183 (6th Cir. 1984), relied upon by the majority, to be "analogous," persuasive, or "on point" on the issue before us. Chrysler in that case placed a number of workers on involuntary retirement because of drastic cutbacks in its business. ~~This was~~ a true "forced early retirement" case; plaintiffs over 55 were willing and able to work, but Chrysler, by reason of claimed economic necessity, concededly required them to take early retirement without being offered "layoff" status (with opportunity for future reinstatement) as were other employees. Again, the facts and rationale of *Chrysler* are entirely distinguishable from those in the instant case. Betts was offered the equivalent of layoff – medical leave – with opportunity for reinstatement, but she herself opted for early retirement with pension and retirement benefits, although she had worked for the Ohio Board only five years. In *Chrysler*, this court affirmed the district court decision requiring the employers to place the retired workers on a layoff status because the "loss of future prospects *for work*" was found to be antithetical to the ADEA. 733 F.2d at 1186 (emphasis added). Denial of a work opportunity for those who wanted to work in *Chrysler* is a far cry, in my opinion, from the offer made to Betts who knew she was unable to work and chose to take another option available to her under a plan, a valid plan according to the Supreme Court, not a "subterfuge," when adopted. *Chrysler* forced its employees of a certain age to retire and denied them layoff status. No one *forced* Betts to stop working. *See Betts*, 109 S. Ct. at 2862, 2868 (reaffirming the rule in *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977)). *Chrysler*, moreover, was based on cost factors and

"least-detrimental-alternative means" to accomplish cost reduction in respect to age discrimination allegations. 733 F.2d at 1186. This "cost justification requirement" for retirement plans such as PERS was *expressly rejected* by the Supreme Court in *Betts*. 109 S. Ct. at 2865.[4] *See also EEOC v. Bethlehem Steel Corp.*, No. 88-0175 (E.D. Pa. Jan. 2, 1990).

The majority concedes that Betts "retired for health reasons." Her retirement, like Dr. Weihaupt's resignation in *Weihaupt v. American Medical Association*, 874 F.2d 419 (7th Cir. 1989), was due to "serious health problems." *Id.* at 425. I agree with that court's observation, which is consistent with the Supreme Court's decision in *Betts*, that

> a discharge based on his poor health is not actionable under the ADEA. " 'Congress made plain that the age statute was not meant to prohibit employment decisions based on factors that sometimes accompany advancing age, such as declining health or diminished vigor and competence.' " *Holley v. Sanyo Manufacturing, Inc.*, 771 F.2d 1161, 1167 (8th Cir. 1985) (quoting

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[4] *Chrysler* was described in *EEOC v. Cargill, Inc.*, 855 F.2d 682, 685 (10th Cir 1988), as holding that the 1978 amendment to Section 4(f)(2) completely overruled *McMann v. United Airlines, Inc.*, 434 U.S. 192 (1977). In *Betts*, the Supreme Court made it clear that *McMann* was not overruled. To that extent, *Chrysler* was in error in light of *Betts* as to retirement-plans which were not a "subterfuge." 109 S. Ct. at 2862. *Cargill* held that in a comparable situation Cargill was not required to justify the different treatment, for group life insurance purposes, of employees under 60 years of age and those over 60 years of age. *Cargill*, 855 F.2d at 686.

Loeb v. Textron, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979)).

Weihaupt 874 F.2d at 425. *Weihaupt*, moreover, supports PERS' position in the instant case concerning Betts' claim of "forced" retirement. *Weihaupt* held that proof of *forced* retirement had to be akin to proof of constructive discharge. *Id.* at 425-26. *Henn v. National Geographic Society*, 819 F.2d 824 (7th Cir.) *cert. denied*, 484 U.S. 964 (1987), also supports PERS' position in holding that in a case of early retirement, one claiming that it was forced retirement had to establish the equivalent of a constructive discharge. 819 F.2d at 826. As in *Henn*, the employer in this case has shown a "sound business purpose" and the absence of "subterfuge" in the adoption of the retirement plan at issue, and, accordingly, the employer and the plan challenged should prevail. There was no equivalent of constructive discharge in the facts of this case even from Betts' perspective. Betts was not forced to retire because of her age; rather, she elected to retire, for health reasons, to receive retirement benefits.

Other courts that have considered similar issues have found for the employer and/or pension plan. *See EEOC v. State of Maine and Retirement System*, 644 F. Supp. 223 (D. Me. 1986), *aff'd mem.*, 823 F.2d 542 (1st Cir. 1987); *EEOC v. Cargill, Inc.*, 855 F.2d 682 (10th Cir. 1988); and *EEOC v. USX Corp.*, No. 87-6044 (E.D. Pa. Mar. 23, 1989). The majority cites not a single case to support the result reached involving an employee who could not work and who then chose retirement benefits. There was no compulsory retirement forced upon an employee who desired to, or was capable of, continuing work. This was in no way comparable to a constructive discharge situation.

I believe the majority opinion overlooks the admonition in *Betts*, that "Congress recognized that not all age discrimination in employment is 'arbitrary'." 109 S. Ct. at 2865. Not all such discrimination, if it is shown, is the "type of age discrimination that Congress sought to eliminate." *Id.* Thus, even if Betts did establish some *prima facie* indicia of age discrimination, she did not demonstrate illegal, "arbitrary" age discrimination in this *"bona fide* benefit plan." The Committee Reports of the ADEA, as pointed out by the Supreme Court, indicate the primary purpose of ADEA was to encourage " 'hiring of older workers by permitting employment without necessarily including such workers in employee benefit plans'." *Id.* at 2867. Betts was hired at age 55; this would be strong evidence, in and of itself, that defendant employer was not disposed to discriminate against older workers. She was, in addition, retained up through age 60 despite growing health problems and disability – a further such indication of absence of discrimination against an older employee. A broader reading of the language of exemption § 4(f)(2) "is the correct one" mandated by the Supreme Court rather than the narrow view taken by the majority. *Id.*

In light of the principles herein set out and the guidance of the Supreme Court in *Betts*, I would accordingly reverse the judgment of the district court.

OPINION OF THE SUPREME COURT OF THE UNITED STATES

(Reported at ___ U.S. ___, 109 S.Ct. 2854)

No. 88-389

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO, APPELLANT v. JUNE M. BETTS

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 23, 1989]

JUSTICE KENNEDY delivered the opinion of the Court.

The Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. § 621 et seq., forbids arbitrary discrimination by public and private employers against employees on account of age. Under § 4(f)(2) of the Act, 29 U.S.C. § 623(f)(2), however, age-based employment decisions taken pursuant to the terms of "any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the Act, are exempt from the prohibitions of the ADEA. In the case before us, we must consider the meaning and scope of the § 4(f)(2) exemption.

I

A

In 1933, the State of Ohio established the Public Employees Retirement System of Ohio (PERS) to provide retirement benefits for state and local government

employees. Public employers and employees covered by PERS make contributions to a fund maintained by PERS to pay benefits to covered employees. Under the PERS statutory scheme, two forms of monthly retirement benefits are available to public employees upon termination of their public employment. Age-and-service retirement benefits are paid to those employees who at the time of their retirement (1) have at least 5 years of service credit and are at least 60 years of age; (2) have 30 years of service credit; or (3) have 25 years of service credit and are at least 55 years of age. Ohio Rev. Code Ann. §§ 145.33, 145.34 (1984 and Supp. 1988). Disability retirement benefits are available to employees who suffer a permanent disability, have at least five years of total service credit, and are under the age of 60 at retirement. § 145.35. The requirement that disability retirees be under age 60 at the time of their retirement was included in the original PERS statute, and has remained unchanged since 1959.

Employees who take disability retirement are treated as if they are on leave of absence for the first five years of their retirement. Should their medical conditions improve during that time, they are entitled to be rehired. § 145.39. Employees receiving age-and-service retirement, on the other hand, are not placed on leave of absence, but they are permitted to apply for full-time employment with any public employer covered by PERS after 18 months of retirement. Ohio Rev. Code Ann. § 145.381(C) (1984). Once an individual retires on either age-and-service or disability retirement benefits, he or she continues to receive that type of benefit throughout retirement, regardless of age.

B

Appellee June M. Betts was hired by the Hamilton County Board of Mental Retardation and Developmental Disabilities as a speech pathologist in 1978. The Board is a public agency, and its employees are covered by PERS. In 1984, because of medical problems, appellee became unable to perform her job adequately and was reassigned to a less demanding position. Appellee's medical condition continued to deteriorate, however, and by May 1985, when appellee was 61 years of age, her employer concluded that she was no longer able to perform adequately in any employment capacity. Appellee was given the choice of retiring or undergoing medical testing to determine whether she should be placed on unpaid medical leave. She chose to retire, an option which gave her eligibility for age-and-service retirement benefits from PERS. Because she was over 60 at the time of retirement, however, appellee was denied disability retirement benefits, despite her medical condition.

Before 1976, the fact that appellee's age disqualified her for disability benefits would have had little practical significance, because the formula for calculating disability benefits was almost the same as the formula used to determine age-and-service benefits. In 1976, however, the PERS statutory scheme was amended to provide that disability retirement payments would in no event constitute less than 30 percent of the disability retiree's final average salary. Ohio Rev. Code Ann. § 145.36 (1984). No such floor applies in the case of employees receiving age-and-service retirement payments. The difference was of much significance in appellee's case: her age-and-service retirement benefits amount to $158.50 per month, but she

would have received nearly twice that, some $355 per month, had she been permitted to take disability retirement instead.

Appellee filed an age discrimination charge against PERS with the Equal Opportunity Employment Commission, and filed suit in the United States District Court for the Southern District of Ohio, claiming that PERS' refusal to grant her application for disability retirement benefits violated the ADEA. The District Court found that PERS' retirement scheme was discriminatory on its face, in that it denied disability retirement benefits to certain employees on account of their age. The court rejected PERS' reliance on § 4(f)(2) of the ADEA, which exempts from the Act's prohibitions certain actions taken in observance of "the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [the Act]. . . . " 29 U.S.C. § 623(f)(2). Relying on interpretive regulations promulgated by the EEOC, the District Court held that employee benefit plans qualify for the § 4(f)(2) exemption only if any age-related reductions in employee benefits are justified by the increased cost of providing those benefits to older employees. Because the PERS plan provided for a reduction in available benefits at age 60, a reduction not shown to be justified by considerations of increased costs, the court concluded that PERS' plan was not entitled to claim the protection of the § 4(f)(2) exemption.[1]

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[1] The District Court also found that PERS' disability retirement plan was not covered by § 4(f)(2) because PERS' actions

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A divided panel of the Court of Appeals affirmed. 848 F. 2d 692 (CA6 1988). The majority agreed with the District Court that the § 4(f)(2) exemption is available only to those retirement plans that can provide age-related cost justifications or "a substantial business purpose" for any age-based reduction in benefits. *Id.*, at 694. The majority rejected PERS' reliance on *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977), which held that retirement plans adopted prior to the enactment of the ADEA need not be justified by any business purpose, concluding that Congress had "expressly repudiated" this decision when it amended the ADEA in 1978. 848 F. 2d, at 694. Because PERS had failed to provide any evidence that its discrimination against older workers was justified by age-related cost considerations, the majority concluded that summary judgment was appropriate.

Judge Wellford dissented. Noting that PERS' plan was adopted long before enactment of the ADEA, he argued that under *United Air Lines, Inc. v. McMann, supra*, it could not be a "subterfuge to evade the purposes" of the Act. Judge Wellford rejected the EEOC's regulations requiring cost justifications for all age-based reductions in benefits, finding that nothing in the statute's language imposed such a requirement. We noted probable jurisdiction, 488 U.S. ___ (1989), and now reverse.

(Continued from previous page)

were not taken pursuant to the terms of the plan, and because the plan impermissibly permits or requires involuntary retirement on the basis of age.

II

Under Section 4(a)(1) of the ADEA, it is unlawful for an employer

> "to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1).

Notwithstanding this general prohibition, however, § 4(f)(2) of the ADEA provides that it is *not* unlawful for an employer

> "to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual." 29 U.S.C. § 623(f)(2).

On its face, the PERS statutory scheme renders covered employees ineligible for disability retirement once they have attained age 60. Ohio Rev. Code Ann. § 145.35 (1984). PERS' refusal to grant appellee's application for disability benefits therefore qualifies as an action "to observe the terms of" the plan. All parties apparently concede, moreover, that PERS' plan is "bona fide," in that it " 'exists and pays benefits.' " *McMann*, 434 U.S., at 194; see *id.*, at 206-207 (WHITE, J., concurring in judgment). Finally, whatever the precise meaning of the phrase "any . . . employee benefit plan such as a retirement, pension, or insurance plan," see *infra*, at ___-___, it is apparent that

a disability retirement plan falls squarely within that category. Cf. 29 CFR § 1625.10(f)(1)(ii) (1988). Accordingly, PERS is entitled to the protection of the § 4(f)(2) exemption unless its plan is "a subterfuge to evade the purposes of" the Act.[2]

We first construed the meaning of "subterfuge" under § 4(f)(2) in *United Air Lines, Inc. v. McMann, supra.* In *McMann,* the employer's retirement plan required employees to retire at the age of 60. After being forced to retire by the terms of the plan, McMann sued under the ADEA, claiming that the forced retirement was a violation of the Act, and that the mandatory retirement provision was not protected by the § 4(f)(2) exemption because it was a subterfuge to evade the purposes of the Act.[3] We rejected both positions. With respect to mandatory retirement, we found that the statutory language and legislative history provided no support for the proposition that Congress intended to forbid age-based mandatory retirement.

Turning to the claim that the mandatory retirement provision was a "subterfuge to evade the purposes of"

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[2] As a result of the 1978 amendments, § 4(f)(2) cannot be used to justify forced retirement on account of age. Appellee contends, and the District Court found, that appellee was forced to retire under the terms of PERS' plan, and that as a result § 4(f)(2) is unavailable to PERS. The Court of Appeals did not address this question, and we express no opinion on it, leaving its resolution to that court on remand.

[3] When *McMann* was decided, § 4(f)(2) did not contain the final clause excluding from its protection benefit plans that "require or permit the involuntary retirement of any individual . . . because of the age of such individual."

the Act, we rejected the conclusion of the court below that forced retirement on the basis of age must be deemed a subterfuge absent some business or economic purpose for the age-based distinction. Instead, we held that the term "subterfuge" must be given its ordinary meaning as "a scheme, plan, stratagem, or artifice of evasion." Id., at 203. Viewed in this light, the retirement plan at issue could not possibly be characterized as a subterfuge to evade the purposes of the Act, since it had been established in 1941, long before the Act was enacted. As we observed, "[t]o spell out an intent in 1941 to evade a statutory requirement not enacted until 1967 attributes, at the very least, a remarkable prescience to the employer. We reject any such *per se* rule requiring an employer to show an economic or business purpose in order to satisfy the subterfuge language of the Act." *Ibid.*

As an initial matter, appellee asserts that *McMann* is no longer good law. She points out that in 1978, less than a year after *McMann* was decided, Congress amended § 4(f)(2) to overrule *McMann's* validation of mandatory retirement based on age. See Pub. L. 95-256, § 2(a), 92 Stat. 189. The result of that amendment was the addition of what now is the final clause of § 4(f)(2).

The legislative history of the 1978 amendment contains various references to the definition of subterfuge, and according to appellee these reveal clear congressional intent to disapprove the reasoning of *McMann*. The Conference Committee Report on the 1978 amendment, for example, expressly discusses and rejects *McMann*, stating that "[p]lan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments."

H.R. Conf. Rep. No. 95-950, p. 8 (1978). See also 124 Cong. Rec. 7881 (1978) (remarks of Rep. Hawkins) ("The conferees specifically disagree with the Supreme Court's holding and reasoning in [*McMann*], particularly its conclusion that an employee benefit plan which discriminates on the basis of age is protected by § 4(f)(2) because it predates the enactment of the ADEA"); 124 Cong. Rec. 8219 (1978) (remarks of Sen. Javits); id., at 7888 (remarks of Rep. Waxman).

PERS disputes appellee's interpretation of this legislative history, asserting that it refers only to benefit plans that permit involuntary retirement and not to the more general issue of whether a pre-Act plan can be a subterfuge in other circumstances. We need not resolve this dispute, however. The 1978 amendment to the ADEA did not add a definition of the term "subterfuge" or modify the language of § 4(f)(2) in any way, other than by inserting the final clause forbidding mandatory retirement based on age. We have observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute. See *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982); *Consumer Products Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118, and n. 13 (1980); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968); *Rainwater v. United States*, 356 U.S. 590, 593 (1958); see also *McMann*, 434 U.S., at 200, n. 7. Congress changed the specific result of *McMann* by adding a final clause to § 4(f)(2), but it did not change the controlling, general language of the statute. As Congress did not amend the relevant statutory language, we see no reason to depart from our holding in *McMann* that

the term "subterfuge" is to be given its ordinary meaning, and that as a result an employee benefit plan adopted prior to enactment of the ADEA cannot be a subterfuge. See *EEOC v. Cargill, Inc.*, 855 F. 2d 682, 686 (CA10 1988); *EEOC v. County of Orange*, 837 F.2d 420, 422 (CA9 1988).

According to PERS, our reaffirmation of *McMann* should resolve this case. The PERS system was established by statute in 1933, and the rule that employees over age 60 may not qualify for disability retirement benefits has remained unchanged since 1959. The ADEA was not made applicable to the States until 1974. See Pub. L. 93-259, § 28(a)(2), 88 Stat. 74, codified at 29 U.S.C. 630(b)(2). Since the age-60 requirement pre-dates application of the ADEA to PERS, PERS argues that, under *McMann*, its plan cannot be a subterfuge to evade the purposes of the ADEA.

While *McMann* remains of considerable relevance to our decision here, we reject the argument that it is dispositive. It is true that the age-60 rule was adopted before 1974, and is thus insulated under *McMann* from challenge as a subterfuge. The plan provision attacked by appellee, however, is the rule that disability retirees automatically receive a minimum of 30 percent of their final average salary upon retirement, while disabled employees who retire after age 60 do not. The 30 percent floor was not added to the plan until 1976, and to the extent this new rule increased the age-based disparity caused by the pre-Act age limitation, *McMann* does not insulate it from challenge. See *EEOC v. Cargill, supra*, at 686, n. 4; EEOC v. *County of Orange, supra*, at 423; *EEOC v. Home Ins. Co.*, 672 F. 2d 252, 259, and n. 9 (CA2 1982). No "remarkable prescience" would have been required of PERS in 1976

for it to formulate the necessary intent to evade the ADEA, and thus the automatic rule of *McMann* is applicable. See 434 U.S., at 203. Accordingly, we must turn to an inquiry into the precise meaning of the § 4(f)(2) exemption in the context of post-Act plans.

III

Appellee and her *amici* say that § 4(f)(2) protects age-based distinctions in employee benefit plans only when justified by the increased cost of benefits for older workers. They cite an interpretive regulation promulgated by the Department of Labor, the agency initially charged with enforcing the Act, in 1979. 44 Fed. Reg. 30658-30662 (1979), codified at 29 CFR § 860.120 (1980), redesignated 29 CFR § 1625.10 (1988). The regulation recites that the purpose of the exemption "is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations," and that "benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers." § 1625.10(a)(1). With respect to disability benefits in particular, the regulation provides that "[r]eductions on the basis of age in the level or duration of benefits available for disability are justifiable only on the basis of age-related cost considerations. . . . " § 1625.10(f) (1)(ii). Under these provisions, employers may reduce the value of the benefits provided to older workers as necessary to equalize costs for workers of all ages, but they cannot exclude older workers from the coverage of their benefit plans altogether.

The requirement that employers show a cost-based justification for age-related reductions in benefits appears nowhere in the statute itself. The EEOC as *amicus* contends that this rule can be drawn either from the statutory requirement that age-based distinctions in benefit plans not be a subterfuge to evade the purposes of the Act, or from the portion of § 4(f)(2) limiting its scope to actions taken pursuant to "any bona fide employee benefit plan such as a retirement, pension, or insurance plan." Brief for EEOC as *Amicus Curiae* 9-14. We consider these alternatives in turn.

A

The regulations define "subterfuge" as follows: "In general, a plan or plan provision which prescribes lower benefits for older employees on account of age is not a 'subterfuge' within the meaning of section 4(f)(2), provided that the lower level of benefits is justified by age-related cost considerations." 29 CFR § 1625.10(d) (1988). Various lower courts have accepted this definition. E.g., *EEOC v. City of Mt. Lebanon, Pa.*, 842 F. 2d 1480, 1489 (CA3 1988); see also *Cipriano v. Board of Education*, 785 F. 2d 51, 57-58 (CA2 1986). As the analysis in *McMann* makes apparent, however, this approach to the definition of subterfuge cannot be squared with the plain language of the statute. Although *McMann's* holding, that pre-Act plans can never be a subterfuge, is not dispositive here, its reasoning is nonetheless controlling, for we stated in that case that "subterfuge" means "a scheme, plan, stratagem, or artifice of evasion," which, in the context of § 4(f)(2), connotes a specific "intent . . . to evade a statutory requirement." 434 U.S., at 203. The term thus

includes a subjective element that the regulation's objective cost-justification requirement fails to acknowledge.

Ignoring this inconsistency with the plain language of the statute, appellee and the EEOC suggest that the regulation represents a contemporaneous and consistent interpretation of the ADEA by the agencies responsible for the Act's enforcement, and is therefore entitled to special deference. See *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600, n. 17 (1981); see also *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984). But of course, no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.

Contrary to the suggestion of the EEOC and appellee, moreover, the cost-justification requirement was not adopted contemporaneously with enactment of the ADEA. The cost-justification rule had its genesis in an interpretive bulletin issued by the Department of Labor in January 1969. 34 Fed. Reg. 322, 323 (1969), codified at 29 CFR § 860.120(a) (1970). To be sure, that regulation provided that plans which reduced benefits on the basis of age would "be considered in compliance with the statute" if the benefit reductions were justified by age-related cost considerations, but it did not purport to exclude from the § 4(f)(2) exemption all plans that could not meet a cost-justification requirement.[4] Rather, this

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[4] As originally promulgated in January 1969, the regulation provided: "Section 4(f)(2) of the Act provides that it is not

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original version of the cost-justification rule was nothing more than a safe-harbor, a nonexclusive objective test for employers to use in determining whether they could be certain of qualifying for the § 4(f)(2) exemption. It was not until 1979 that this regulatory safe-harbor was transformed into the exclusive means of escaping classification as a subterfuge.

Appellee and her *amici* rely in large part on the legislative history of the ADEA and the 1978 amendments. In view of our interpretation of the plain statutory language of the subterfuge requirement, however, this reliance on legislative history is misplaced. See *Davis v. Michigan Dept. of Treasury*, 489 U.S. ___, ___, n. 3 (1989);

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unlawful for an employer, employment agency, or labor organization 'to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual. . . . ' Thus, an employer is not required to provide older workers who are otherwise protected by the law with the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between them is in accordance with the terms of a bona fide benefit plan. For example, an employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers that he does to younger workers, where the plan is not a subterfuge to evade the purposes of the Act. A retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage." 29 CFR § 860.120(a) (1970).

McMann, 434 U.S., at 199. The "subterfuge" exception to the § 4(f)(2) exemption cannot be limited in the manner suggested by the regulation.

B

The second possible source of authority for the cost-justification rule is the statute's requirement that the § 4(f)(2) exemption be available only in the case of "any bona fide employee benefit plan such as a retirement, pension, or insurance plan." The EEOC argues, and some courts have held, that the phrase "such as a retirement, pension, or insurance plan" is intended to limit the protection of § 4(f)(2) to those plans which have a cost justification for all age-based differentials in benefits. See *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211, 224 (CA3 1983), cert. denied, 469 U.S. 820 (1984); *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1396 (CA9 1984). The argument is as follows: the types of plans listed in the statute share the common characteristic that the cost of the benefits they provide generally rises with the age of their beneficiaries. This common characteristic suggests that Congress intended the § 4(f)(2) exemption to cover only those plans in which costs rise with age. The obvious explanation for the limitation on the scope of § 4(f)(2), the argument continues, is that the purpose of the exemption is to permit employers to reduce overall benefits paid to older workers only to the extent necessary to equalize costs for older and younger workers.

There are a number of difficulties with this explanation for the cost-justification requirement. Perhaps most obvious, it requires us to read a great deal into the

language of this clause of § 4(f)(2), language that appears on its face to be nothing more than a listing of the general types of plans that fall within the category of "employee benefit plan." The statute's use of the phrase "*any* employee benefit plan" seems to imply a broad scope for the statutory exemption, and the "such as" clause suggests enumeration by way of example, not an exclusive listing. Nor is it by any means apparent that the types of plans mentioned were intentionally selected because the cost to the employer of the benefits provided by these plans tends to increase with age. Indeed, many plans that fall within these categories do not share that particular attribute at all, defined-contribution pension plans perhaps being the most obvious example.[5] We find it quite difficult to believe that Congress would have chosen such a circuitous route to the result urged by respondent and the EEOC.

The interpretation is weakened further by the fact that the regulation itself does not support it. According to 29 CFR § 1625.10(b) (1988), "[a]n 'employee benefit plan' is a plan, such as a retirement, pension, or insurance plan, which provides employees with what are frequently

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[5] A defined contribution plan is one in which "the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide." *Alabama Power Co. v. Davis*, 431 U.S. 581, 593, n. 18 (1977); see 29 U.S.C. § 1002(34). Under this type of plan, the cost of making contributions for any given employee is completely unrelated to that employee's age. The dissent therefore is quite wrong to suggest that these plans "commonly – indeed, almost invariably – entail costs that rise with the age of the beneficiary. . . . " *Post*, at ___.

referred to as 'fringe benefits.' " This definition makes no mention of the limitation urged by the EEOC, and indeed seems sufficiently broad to encompass a wide variety of plans providing fringe benefits to employees, regardless of whether the cost of those benefits increases with age. The regulation's discussion of the cost-justification requirement is reserved for the subsection defining "subterfuge." § 1625.10(d).[6] Under these circumstances, this

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[6] Regulations issued by the Department of Labor in 1969 did provide that "[n]ot all employee benefit plans but only those similar to the kind enumerated in section 4(f)(2) of the Act come within this provision." 34 Fed. Reg. 9708, 9709 (1969), codified at 29 CFR 860.120(b) (1970). Accordingly, the regulations suggested that "a profit-sharing plan as such would not appear to be within [the] terms" of § 4(f)(2). *Ibid.* According to the EEOC, this provision reflects the Department's conclusion that § 4(f)(2) "would not shield discrimination against older employees in the provision of profit-sharing benefits because the cost of providing those benefits does not increase as employees age." Brief for EEOC as *Amicus Curiae* 10-11 n.4. Nothing in the regulation suggested, however, that the reason for the exclusion of profit-sharing plans was that such plans were not characterized by increasing costs with age. To the contrary, it seems clear that the Department of Labor viewed the § 4(f)(2) exemption as applicable to plans that served the purpose of retirement, pension, or insurance plans, regardless of whether the cost of the benefits provided by such plans rose with the age of their beneficiaries:

"However, where it is the essential purpose of a plan financed from profits to provide retirement benefits for employees, the exception may apply. The 'bona fides' of such plans will be considered on the basis of all the particular facts and circumstances." 29 CFR § 860.120(b) (1970).

We express no opinion, of course, on the precise meaning of the phrase "any bona fide employee benefit plan such as a

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aspect of the EEOC's argument is entitled to little, if any, deference. Cf. *Bowen v. Georgetown University Hospital*, 488 U.S. ___ ___ (1988).

For these reasons, we conclude that the phrase "any bona fide employee benefit plan such as a retirement, pension, or insurance plan" cannot reasonably be limited to benefit plans in which all age-based reductions in benefits are justified by age-related cost considerations. Accordingly, the interpretive regulation construing § 4(f)(2) to include a cost-justification requirement is contrary to the plain language of the statute, and is invalid.

IV

Having established that the EEOC's definition of subterfuge is invalid, we turn to the somewhat more difficult task of determining the precise meaning of the term as applied to post-Act plans. We begin, as always, with the language of the statute itself.

The protection of § 4(f)(2) is unavailable to any employee benefit plan "which is a subterfuge to evade the purposes of" the Act. As set forth in § 2(b) of the ADEA, the purposes of the Act are "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on

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retirement, pension, or insurance plan." We hold only that it does not support the cost-justification requirement urged by appellee and the EEOC.

employment." 29 U.S.C. § 621(b). On the facts of this case, the only purpose that the PERS plan could be a "subterfuge to evade" is the goal of eliminating "arbitrary age discrimination in employment."

As the presence of the various exemptions and affirmative defenses contained in § 4(f) illustrates, Congress recognized that not all age discrimination in employment is "arbitrary." In order to determine the type of age discrimination that Congress sought to eliminate as arbitrary, we must look for guidance to the substantive prohibitions of the Act itself, for these provide the best evidence of the nature of the evils Congress sought to eradicate. Indeed, our decision in *McMann* compels this approach, for it rejected the contention that the purposes of the Act can be distinguished from the Act itself: "[t]he distinction relied on is untenable because the Act is the vehicle by which its purposes are expressed and carried out; it is difficult to conceive of a subterfuge to evade the one which does not also evade the other." 434 U.S., at 198. Accordingly, a post-Act plan cannot be a subterfuge to evade the ADEA's purpose of banning arbitrary age discrimination unless it discriminates in a manner forbidden by the substantive provisions of the Act.

Section 4(a), the ADEA's primary enforcement mechanism against age discrimination by employers, forbids employers

> "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
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> "(3) to reduce the wage rate of any employee in order to comply with this chapter." 29 U.S.C. § 623(a).

The phrase "compensation, terms, conditions, or privileges of employment" in § 4(a)(1) can be read to encompass employee benefit plans of the type covered by § 4(f)(2). Such an interpretation, however, would in effect render the § 4(f)(2) exemption nugatory with respect to post-Act plans. Any benefit plan that by its terms mandated discrimination against older workers would also be facially irreconcilable with the prohibitions in § 4(a)(1) and, therefore, with the purposes of the Act itself. It is difficult to see how a plan provision that expressly mandates disparate treatment of older workers in a manner inconsistent with the purposes of the Act could be said not to be a subterfuge to evade those purposes, at least where the plan provision was adopted after enactment of the ADEA.

On the other hand, if § 4(f)(2) is viewed as exempting the provisions of a bona fide benefit plan from the purview of the ADEA so long as the plan is not a method of discriminating in other, nonfringe-benefit aspects of the employment relationship, both statutory provisions can be given effect. This interpretation of the ADEA would reflect a congressional judgment that age-based restrictions in the employee benefit plans covered by § 4(f)(2) do not constitute the "arbitrary age discrimination in

employment" that Congress sought to prohibit in enacting the ADEA. Instead, under this construction of the statute, Congress left the employee benefit battle for another day, and legislated only as to hiring and firing, wages and salaries, and other nonfringe-benefit terms and conditions of employment.

To be sure, this construction of the words of the statute is not the only plausible one. But the alternative interpretation would eviscerate § 4(f)(2). As JUSTICE WHITE wrote in his separate concurrence in *McMann*, "[b]ecause all retirement plans necessarily make distinctions based on age, I fail to see how the subterfuge language, which was included in the original version of the bill and was carried all the way through, could have been intended to impose a requirement which almost no retirement plan could meet." 434 U.S., at 207.

Not surprisingly, the legislative history does not support such a self-defeating interpretation, but to the contrary shows that Congress envisioned a far broader role for the § 4(f)(2) exemption. When S. 830, the bill that was to become the ADEA, was originally proposed by the Administration in January 1967, it contained no general exemption for benefit plans that differentiated in benefits based on age.[7] Senator Javits, one of the principal moving forces behind enactment of age discrimination legislation,

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[7] The Administration bill's version of § 4(f)(2) provided that "[i]t shall not be unlawful for an employer, employment agency, or labor organization . . . to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act." 113 Cong. Rec. 2794 (1967).

generally favored the Administration's bill, but believed that a broader exemption for employee benefit plans was needed. Accordingly, he proposed an amendment substantially along the lines of present-day § 4(f)(2). 113 Cong. Rec. 7077 (1967).

One factor motivating Senator Javits' amendment was the concern that, absent some exemption for benefit plans, the Act might "actually encourage employers, faced with the necessity of paying greatly increased premiums, to look for excuses not to hire older workers when they might have done so under a law granting them a degree of flexibility with respect to such matters." *Id.*, at 7076.[8] Reducing the cost of hiring older workers was not the only purpose of the proposed amendment, however. Its goals were far more comprehensive. As Senator Javits put it, "the age discrimination law is not the proper place to fight" the battle of ensuring "adequate pension benefits for older workers," and § 4(f)(2) was therefore intended to be "a fairly broad exemption . . . for bona fide retirement and seniority systems." *Ibid.* Later, referring to the effect of his proposed amendment on the provisions of employee benefit plans, Senator Javits stated that "[i]f the older worker choses to waive all of those provisions, then the older worker can obtain the benefits of this act. . . . " *Id.*, at 31255. And finally, in his

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[8] Elsewhere, Senator Javits explained that under his version of § 4(f)(2) "an employer will not be compelled to afford older workers exactly the same pension, retirement, or insurance benefits as younger workers and thus employers will not, because of the often extremely high cost of providing certain types of benefits to older workers, actually be discouraged from hiring older workers." 113 Cong. Rec. 31254-31255 (1967).

individual views accompanying the Senate Report on S. 830, Senator Javits observed: "I believe the bill has also been improved by the adoption of language, based on an amendment which I had offered, *exempting the observance of bona fide seniority systems and retirement, pension, or other employment benefit plans from its prohibitions.*" S. Rep. No. 723, 90th Cong., 1st Sess., 14 (1967) (emphasis added).

Other Members of Congress expressed similar views. Senator Yarborough, the principal sponsor and floor manager of the Administration bill, observed that § 4(f)(2), "when it refers to retirement, pension, or insurance plan, it means that a man who would not have been employed except for this law does not have to receive the benefits of the plan." 113 Cong. Rec. 31255 (1967). Indeed, at least one Congressman opposed the ADEA precisely because it permitted employers to exclude older employees from participation in benefit plans altogether when the terms of the plans mandated that result. 113 Cong. Rec. 34745 (1967) (remarks of Rep. Smith).

While the Committee Reports on the ADEA do not address the matter in any detail, they do state that § 4(f)(2) "serves to emphasize the primary purpose of the bill – hiring of older workers – by permitting employment without necessarily including such workers in employee benefit plans." S. Rep. No. 723, *supra*, at 4; H. R. Rep. No. 805, 90th Cong., 1st Sess., 4 (1967). That explanation does not support a narrow reading of the § 4(f)(2) exemption. The Committee Reports, moreover, refute a reading of § 4(f)(2) that would limit its protection to pre-Act plans, for they make it clear that the exemption "applies to new and existing employee benefit plans, and to both the establishment and maintenance of such

plans." S. Rep. No. 723, *supra*, at 4; H. R. Rep. No. 805, *supra*, at 4. In short, the legislative history confirms that the broader reading of § 4(f)(2) is the correct one, and that Congress intended to exempt employee benefit plans from the coverage of the Act except to the extent plans were used as a subterfuge for age discrimination in other aspects of the employment relation.

While this result permits employers wide latitude in structuring employee benefit plans, it does not render the "not a subterfuge" proviso a dead letter. Any attempt to avoid the prohibitions of the Act by cloaking forbidden discrimination in the guise of age-based differentials in benefits will fall outside the § 4(f)(2) exemption. Examples of possible violations of this kind can be given. Under § 4(d) of the ADEA, for example, it is unlawful for an employer to discriminate against an employee who has "opposed any action made unlawful by" the Act or has participated in the filing of any age-discrimination complaints or litigation. Nothing in § 4(f)(2) would insulate from liability an employer who adopted a plan provision formulated to retaliate against such an employee. See 29 CFR § 1625.10(d)(5) (1988). Similarly, while § 4(f)(2) generally protects age-based reductions in fringe benefits, an employer's decision to reduce salaries for all employees while substantially increasing benefits for younger workers might give rise to an inference that the employer was in fact utilizing its benefits plan as a subterfuge for age-based discrimination in wages, an activity forbidden by § 4(a)(1). These examples are not exhaustive, but suffice to illustrate the not-insignificant protections provided to older employees by the subterfuge proviso in the § 4(f)(2) exemption.

V

As construed above, § 4(f)(2) is not so much a defense to a charge of age discrimination as it is a description of the type of employer conduct that is prohibited in the employee benefit plan context. By requiring a showing of actual intent to discriminate in those aspects of the employment relationship protected by the provisions of the ADEA, § 4(f)(2) redefines the elements of a plaintiff's prima facie case instead of establishing a defense to what otherwise would be a violation of the Act. Thus, when an employee seeks to challenge a benefit plan provision as a subterfuge to evade the purposes of the Act, the employee bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relation.

This result is supported by our longstanding interpretation of the analogous provision of Title VII, the statute from which "the prohibitions of the ADEA were derived *in haec verba*." *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). Section 703(h) of Title VII states that

> "[n]otwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2(h).

Despite the fact that 703(h), like § 4(f)(2), appears on first reading to describe an affirmative defense, we have

"regarded [§ 703(h)] not as a defense . . . but as a provision that itself 'delineates which employment practices are illegal and thereby prohibited and which are not.' " *Lorance v. AT&T Technologies, Inc.*, ___ U.S. ___, ___ (1989) (quoting *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 758 (1976)). Although the use of the phrase "subterfuge to evade the purposes of [the Act]" in § 4(f)(2) renders the scope of its protection for employee benefit plans broader than the scope of the protection for seniority systems provided by 703(h), the similar structure and purpose of the two provisions supports the conclusion that ADEA plaintiffs must bear the burden of showing subterfuge.

Applying this structure to the facts here, it follows that PERS' disability retirement plan is the type of plan subject to the § 4(f)(2) exemption, and PERS' refusal to grant appellee's request for disability benefits was required by the terms of the plan. Because appellee has failed to meet her burden of proving that the reduction in benefits at age 60 was the result of an intent to discriminate in some nonfringe-benefit aspect of the employment relation, summary judgment for appellee was inappropriate. On remand, the District Court should give appellee an opportunity to demonstrate the existence of a genuine issue of material fact on this issue. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The judgment of the Court of Appeals is reversed and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 88-389

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO, PETITIONER V. JUNE M. BETTS

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 23, 1989]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The majority today immunizes virtually all employee benefit programs from liability under the Age Discrimination in Employment Act of 1967 (ADEA or Act), 29 U.S.C. § 621 *et seq.* (1982 ed. and Supp. V) Henceforth, liability will not attach under the ADEA even if an employer is unable to put forth any justification for denying older workers the benefits younger ones receive, and indeed, even if his only reason for discriminating against older workers in benefits is his abject hostility to, or his unfounded stereotypes of them. In reaching this surprising result, the majority casts aside the estimable wisdom of all five Courts of Appeals to consider the ADEA's applicability to benefit programs, of the two federal agencies which have administered the Act, and of the Solicitor General as *amicus curiae*, all of whom have concluded that it contravenes the text and history of the Act to immunize discrimination against older workers in benefit plans which is not justified by any business purpose. Agreeing with these authorities, and finding the majority's "plain

language" interpretation impossibly tortured and antithetical to the ADEA's goal of eradicating baseless discrimination against older workers, I dissent.

It is common ground that appellant Public Employees Retirement System of Ohio (PERS) discriminated against appellee June Betts on account of her age. Ante, at 5. Had Betts become disabled before, rather than after, turning 60, PERS would be paying her $355.02 a month in disability benefits for the rest of her life, more than double the $158.50 a month she is now entitled to collect. It is also common ground that PERS' facially discriminatory provision was enacted after the ADEA's passage in 1967, and therefore is subject to the Act's broad antidiscrimination command, § 4(a)(1), 29 U.S.C. § 623(a)(1), ante, at 9,[1] and that PERS is liable to Betts for the difference between the monthly sums noted above unless PERS' benefit plan falls within the § 4(f)(2) exemption, 29 U.S.C. § 623(f)(2). *Ante*, at 5. Finally, it is common ground that, based on PERS' refusal to offer any explanation for the age-specific benefits it provides, its disparate treatment of older employees lacked any business justification whatsoever; indeed, the cost to PERS of its disability plan varied not at all with an employee's age. *Ante*, at 4.[2] For want of a better explanation, one is left to

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[1] I agree with the majority that neither our decision in *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977), involving a plan with a mandatory retirement provision adopted prior to the passage of the ADEA, nor Congress' 1978 amendment of § (4)(f)(2) in response to *McMann*, controls this case. *Ante*, at 7-9.

[2] It is no answer to surmise that providing disability benefits to an older worker costs more than providing equivalent

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conclude that PERS denied benefits to those employees who became disabled after turning 60 solely because it wished to cut its overall disability outlays – and that PERS viewed older workers as a convenient target for its budgetary belt-tightening.

This case thus presents the issue of whether a benefit plan which arbitrarily imposes disparate burdens on older workers can claim succor under § 4(f)(2) from age discrimination liability. The majority arrives at the novel conclusion that the ADEA exempts from liability all discriminatory benefit programs, regardless of their justification, unless the discrimination implicates aspects of the employment relationship unrelated to the provision of benefits, and then only if the discrimination violates "the substantive provisions of the Act." *Ante*, at 16. The majority acknowledges that this reading shelters from the ADEA's purview all but a few hypothetical types of benefit-plan age discrimination,[3] leaving older workers

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benefits to a younger worker, as is typically the case with life insurance benefits. PERS, after all, provided full monthly benefits to employees over 60, so long as they had become disabled prior to attaining that age. The sole distinction PERS drew was based on an employee's age at disability, a factor that does not correlate with the cost to an employer of providing benefits. Indeed, insofar as an employer is concerned about the cumulative cost of providing benefits during the remaining life of a disabled employee, this concern militates *in favor* of older workers, whose predicted life-spans are shorter than those of younger workers.

[3] For example, if an employer refuses to provide benefits to an older worker in retaliation for filing a claim under the ADEA, a claim challenging that refusal would be cognizable. *Ante*, at 20.

unprotected from baseless discrimination insofar as it affects the often considerable portion of overall compensation comprised by employee benefits. *Ante*, at 17, 20. The majority thus scuttles the heretofore consensus, and in my view correct, interpretation that the § 4(f)(2) exemption is limited to those programs whose disparate treatment is justified by a plausible business purpose.

To reach the result it does, the majority uses an interpretive methodology, purportedly one parsing § 4(f)(2)'s "plain language," which is so manipulative as virtually to invite the charge or result-orientation. Ordinarily, we ascertain the meaning of a statutory provision by looking to its text, and, if the statutory language is unclear, to its legislative history. *Blum v. Stenson*, 465 U.S. 886, 896 (1984). Where these barometers offer ambiguous guidance as to Congress' intent, we defer to the interpretations of the provision articulated by the agencies responsible for its enforcement, so long as these agency interpretations are "based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); see also *Bethesda Hospital Assn. v. Bowen*, 485 U.S. 399, ___ (1988); *K Mart Corp. v. Cartier, Inc.*, ___ U.S. ___, ___ (1988).

Eschewing this approach, the majority begins its analysis not by seeking to glean meaning from the statute, but by launching a no-holds-barred attack on the business purpose reading of § 4(f)(2). *Ante*, at 9. Disaggregating the sentence that is § 4(f)(2)[4] into two portions,

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[4] Section 4(f)(2) provides that it is not unlawful for an employer "to observe the terms of . . . any bona fide employee

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the majority concludes that the business purpose test is irreconcilable with the "plain language" of the "subterfuge" portion, *ante*, at 10-12, and also cannot be inferred from the text of the portion enumerating types of employee benefit plans. *Ante*, at 12-15. En route to interring the consensus interpretation of § 4(f)(2), the majority pauses not a moment on the provision's purposes or legislative history. Only after burial, and almost by afterthought, does the majority attempt to come up with its own interpretation of the exemption, hastily proceeding to divine the capacious alternative reading outlined earlier.

There are deep problems with the majority's interpretive methodology, chief among them its unwillingness to apply the same unforgiving textual analysis to its reading of the § 4(f)(2) exemption as it does to the consensus reading, and its selective use of legislative history to suggest that Congress contemplated the draconian interpretation of § 4(f)(2) the majority divines. A conventional analysis of § 4(f)(2) illuminates these methodological lapses, and yields a very different result.

Beginning with the text, the only thing plain about § 4(f)(2)'s spare language is that it offers no explicit

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benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual." 29 U.S.C. § 623(f)(2).

command as to what heuristic test those applying it should use. In dispatching the consensus reading, the majority makes much of the fact that "[t]he requirement that employers show a cost-based justification for age-related reductions in benefits appears nowhere in the statute itself." *Ante*, at 10. This truism, is, however, equally applicable to the complex construction the majority adopts, under which all but certain limited species of benefit plan discrimination are exempted from the ADEA, and under which the burden of proving nonexemption is shouldered by the ADEA plaintiff.[5] Indeed, the fact that § 4(f)(2) enumerates various types of benefit programs eligible for exemption from the ADEA's nondiscrimination command but makes no mention of disability programs strongly undercuts the majority's assertion that the text compels exemption here. This is a case in which only so much blood can be squeezed from the textual stone, and in which one therefore must turn to other sources of statutory meaning.

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[5] The majority's holding that the employee bears the heavy burden of proving not only that a discriminatory benefit plan implicates nonbenefit aspects of employment, but also that it was intended to discriminate, strikes a further blow against the statutory rights of older workers. *Ante*, at 21. It is one thing for an employee to prove discrimination against older workers. It is considerably more difficult to prove that an employer undertook such discrimination with unlawful motives. In light of the severe evidentiary and practical obstacles, where discrimination in non-fringe-benefit aspects of the employment relationship has been proved, a more appropriate approach would place the burden on the employer to show that the discrimination was not born of improper intent. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. ___, ___ (1989) (STEVENS, J., dissenting).

The structure of § 4(f)(2), on the other hand, provides considerable support for the business purpose interpretation. The majority views § 4(f)(2) as involving two separate clauses, with the first enumerating, for no apparent reason, three types of benefit plans, and the second, the "subterfuge" clause, making § 4(f)(2)'s exemption applicable except where a benefit plan is created with a "specific 'intent . . . to evade' " the ADEA. *Ante*, at 10. (citation omitted). This reading has the perverse consequence of denying the § 4(f)(2) exemption only to subtle acts of discrimination effected through a stratagem or other artifice of discrimination, while leaving it intact for those age-based distinctions like PERS which, though arbitrary, are so brazenly discriminatory in disentitling older workers to benefits that they cannot possibly warrant the "subterfuge" characterization. It is difficult to believe that Congress, in passing the ADEA, intended to immunize acts of unabashed discrimination against older workers.

A far more sensible structural interpretation regards the § 4(f)(2) sentence as a synthetic whole. Under this reading, the initial enumeration of "a retirement, pension, or insurance plan" serves a concrete purpose: it gives content to the ensuing word "subterfuge." All the enumerated benefit plans commonly – indeed, almost invariably – entail costs that rise with the age of the beneficiary; thus, an employer whose benefit plan treats older workers less favorably than younger ones though spending the same amount on each employee, typically has a cost-based reason for doing so. By this reading, an employer with an economic justification cannot properly be viewed as having resorted to subterfuge to evade the

ADEA's command against irrelevant age distinctions. Unlike the majority's artificial bifurcation of § 4(f)(2), this holistic interpretation does not excuse express acts of unjustified age discrimination like PERS', while punishing only evasive or subtle discrimination. Significantly, all the courts of appeals to consider § 4(f)(2) have concluded that the enumeration of benefit plans where age and cost generally correlate sheds considerable light on the scope of the exemption.[6] And once the possibility of this interpretation is admitted, the majority's sole ground for rejecting the business purpose interpretation – that it clashes with the "plain language of the statute," *ante*, at 11 – necessarily falls away.

The majority's reliance on the text of the statute as a basis for rejecting the business purpose test is, finally, made puzzling in light of its concession that its "construction of the words of the statute is not the only plausible one." *Ante*, at 17. It is difficult to avoid the

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[6] See *Betts v. Hamilton County Bd. of Mental Retardation*, 848 F.2d 692 (CA6 1988); *EEOC v. City of Mt. Lebanon*, 842 F.2d 1480 (CA3 1988); *Karlen v. City of Colleges of Chicago*, 837 F.2d 314 (CA7 1988); *Cipriano v. Board of Ed. of North Tonawanda School Dist.*, 785 F.2d 51 (CA2 1986); *EEOC v. Westinghouse Elec. Corp.*, 725 F.2d 211 (CA3 1983), cert. denied, 469 U.S. 820 (1984); *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (CA9 1984). It is true that these courts took slightly divergent analytic paths to this common result: some have interpreted § 4(f)(2) *ab initio* and others have deferred to the EEOC's statutory reading to this effect; some have imputed the business purpose requirement to the term "subterfuge" and others have instead attributed it to § 4(f)(2) more generally. This divergence, however, in no way vitiates the significance of the Courts of Appeals' unanimity that the statute supports the business purpose requirement.

conclusion that the majority is using two different standards of textual analysis: the business purpose interpretation fails because the plain language of the statute does not command it, but the majority's interpretation succeeds because the plain language of the statute does not preclude it.

Given, then, that some ambiguity remains under any fair reading of § 4(f)(2)'s text and structure, it therefore is appropriate to consult its legislative history. This history convincingly supports the holistic reading and the business purpose interpretation derived therefrom. As initially introduced by Senator Ralph Yarborough in 1967, § 4(f)(2) did not recognize any circumstances that might authorize age discrimination in the provision of fringe benefits. Instead, it sheltered only the employer who "separate[s] involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act." S. 830, 90th Cong., 1st Sess.[7]

Several Senators, however, led by Senator Jacob Javits, urged that employers, in fashioning benefit programs, be allowed to consider cost differentials between

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[7] The narrow scope of this initial exemption may have reflected the fact that Congress was aware that employers at that time did not regard as a major concern the benefit-program costs associated with older workers. See, *e.g.*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964, The Older American Worker: Age Discrimination in Employment 16 (1965) ("[r]elatively few employers . . . cited the costs of providing pension and insurance benefits as significant barriers to employment of older persons").

benefits provided to older employees and those provided to younger ones. During Senate hearings on the bill which became the ADEA, Senator Javits criticized the initial version of § 4(f)(2), stating that that version did "not provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired." Age Discrimination in Employment: Hearings on S. 830 and S. 788 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., 27 (1967). Employers "faced with the necessity of paying greatly increased premiums," Senator Javits feared, might "look for excuses not to hire older workers." *Ibid.* Senator George Smathers, a co-sponsor of the initial bill, acknowledged in response that the bill would not permit employers to vary benefit levels to take into account the greater expense of providing some fringe benefits to older workers. *Id.*, at 29-30. He proposed amending it to permit such variations. The following day, Senator Javits proposed, as a means of incorporated his and Senator Smathers' concerns, an amendment which incorporated essentially the present language enumerating specific types of benefit plans. 113 Cong. Rec. 7077 (1967). The Javits proposal, which was ultimately adopted and which underwent only peripheral changes before the Act's enactment, was designed to ensure, in its sponsor's words, that "an employer will not be compelled to afford older workers exactly the same pension, retirement, or insurance benefits as younger workers and thus employers will not, *because of the often extremely high cost of providing certain types of benefits to older workers*, actually be discouraged from hiring older

workers." 113 Cong. Rec. 31254-31255 (1967) (emphasis added).

The history of § 4(f)(2) militates in favor of the business purpose interpretation in several respects. First, it demonstrates that the sponsors of the exemption intended to protect benefit plans with economic justifications for treating older workers disparately, and did not intend categorically to immunize benefit plans from liability for unjustified discrimination. See *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (statements of sponsors "deserv[e] to be accorded substantial weight in interpreting the statute).[8] Second, this

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[8] The majority attempts to appropriate Senator Javits by stringing together fragments of his comments on the Senate floor. The majority cites his statement that " 'the age discrimination battle is not the proper place to fight' the battle of ensuring 'adequate pension benefits for older workers.' " *Ante*, at 18, quoting 113 Cong. Rec. 7076 (1967). But as the Solicitor General notes, this remark, read in proper context, does not suggest "that *any* type of discrimination in the provision of employee benefits should be permissible under the ADEA," but makes the more limited point that certain existing pension plans with lengthy vesting periods "should be changed by comprehensive pension legislation rather than by an age discrimination statute." Brief for United States as *Amicus Curiae* 17, n. 9 (emphasis added). Senator Javits eventually proposed, and won the enactment of, such legislation. See 29 U.S.C. § 1053. Similarly, Senator Javits' statement that amended § 4(f)(2) provides " 'a fairly broad exemption . . . for bona fide retirement and seniority systems,' " *ante*, at 19, quoting 113 Cong. Rec. 7076 (1967), fully accords with the business purpose test. That test exempts from § 4(f)(2)'s coverage any act of age discrimination with some legitimate business basis – leaving unprotected only the presumably narrow band of benefit programs, like PERS, which practice unjustified age discrimination.

history undercuts the majority's contention that the § 4(f)(2) term "subterfuge to evade the purposes of the Act" supports the broad exemption of benefit plans from coverage. That phrase *predated* the Javits amendment, and was part of the bill when it did not authorize any age-based discrimination in the provision of benefits. The language broadening the exemption must come instead from the enumeration language added at Senator Javits' behest, language most properly read to import only the business purpose test. Third, at no point during the debate on § 4(f)(2) did any legislator come even remotely close to endorsing the construction of § 4(f)(2) chosen by the majority. This silence is hardly surprising, given that an unqualified exemption contravenes Congress' overarching goal in passing the ADEA of protecting older workers against arbitrary discrimination. The business purpose test, on the other hand, advances this goal, playing the hardly radical role of ensuring that, where *no* justification exists for disparate age-based treatment, older workers are not saddled with burdens that should be shared by all workers or by their employer.[9]

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[9] That Congress viewed the § 4(f)(2) exemption as bounded by a business purpose requirement was, if anything, confirmed in 1978, when Congress added a clause in response to *United Air Lines, Inc. v. McMann, supra*. In rejecting a claim that a plan adopted before the ADEA's enactment could be a subterfuge, *McMann* declined to hold that a *"per se* rule require[d] an employer to show an economic or business purpose in order to satisfy the subterfuge language of the Act." 434 U.S., at 203. This statement, referring only to pre-ADEA plans, left open the issue of a *per se* business purpose rule for discriminatory plan provisions adopted after the Act's passage. Reiterating the need for an economic justification for discrimination, Senator Javits stated during the 1978 debate: "The

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Even if I did not strongly believe that the text and structure of the § 4(f)(2) exemption, as informed by its legislative history, limits the exemption to benefit plans whose discrimination against older workers rests on some business justification, I would still conclude that adoption of the business purpose test is mandated under *Chevron's* admonishment to defer to enforcement agencies' reasonable interpretations of ambiguous statutory provisions. See *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412 (1985) (deferring to Department of Labor and EEOC on interpretation of ADEA). Shortly after the ADEA's passage, the Department of Labor, which originally administered the Act, interpreted § 4(f)(2) to allow employers to discriminate on the basis of age in the provision of employee benefits, but only where providing such benefits was more expensive for older workers. See 29 CFR § 860.120(a) (1970). Where cost did not vary with age, the Department of Labor concluded, § 4(f)(2) did not exempt from ADEA scrutiny discriminatory benefit programs. See *id.*, at § 860.120(b) ("[n]ot all employee benefit plans, but only those similar to the kind enumerated in Section 4(f)(2) come within this provision," and thus profit-sharing and other plans lacking an economic basis

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meaning of the exception, as I stated in [the 1967] colloquy with Senator Yarborough on the Senate floor, was that an 'employer will not be compelled under this section to afford to older workers exactly the same pension, retirement or insurance benefits as he affords to younger workers.'" 124 Cong. Rec. 8218 (1978). The senator explained that "[w]elfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers." *Ibid.*

for discriminating against older workers were not exempted by § 4(f)(2)); 34 Fed. Reg. 9709 (1969) (same).[10] The EEOC, to which responsibility for enforcing the ADEA was transferred in 1979, adopted in toto Labor's business purpose interpretation of § 4(f)(2). The EEOC's regulations state that § 4(f)(2)'s purpose "is to permit age-based reductions in employee benefit plans *where such reductions are justified by significant cost considerations.*" 29 CFR § 1625.10(a)(1) (1988) (emphasis added).[11] The

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[10] The majority's dismissal of this administrative interpretation of § 4(f)(2) on the ground that it was not contemporaneously issued is disingenuous. In the majority's view, the Department of Labor initially articulated a broad "safe harbor" exemption for benefit programs, and only in 1979 revised its interpretation to adopt the business-purpose test. *Ante,* at 11-12. The sole support the majority adduces for this proposition is the Department of Labor's 1969 regulation providing that age-related benefit reductions would be "considered in compliance with the statute" if cost-justified. *Ante,* at 11, quoting 29 CFR § 860.120(a) (1970). This regulation does not demonstrate that Labor was applying a business purpose test, the majority suggests, apparently because the regulation failed explicitly to state the corollary proposition that non-cost-justified plans fall outside the statutory exemption. This tenuous reading fails to explain (1) why Labor saw a need to include the cost-justification qualification in its reading of the exemption; (2) why Labor stated that profit-sharing plans, lacking an economic basis for age-discriminating, fall outside the exemption; and (3) why Labor, in its 1979 pronouncement, in no way suggested it was changing its construction of § 4(f)(2).

[11] See also 29 CFR § 1625.10(a)(1) (1988) ("[a] benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby

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majority's derogation of this dual agency interpretation leaves one to wonder why, when important civil rights laws are at issue, the Court fails to adhere with consistency to its so often espoused policy of deferring to expert agency judgment on ambiguous statutory questions. See, *e.g.*, *General Elec. Co. v. Gilbert*, 429 U.S. 125, 155-156 (1976) (BRENNAN, J., dissenting).

The majority today puts aside conventional tools of statutory construction and, relying instead on artifice and invention, arrives at a draconian interpretation of the ADEA which Congress most assuredly did not contemplate, let alone share, in 1967, in 1978, or now. Because I cannot accept that it is the ADEA's command to give employers a free hand to fashion discriminatory benefit programs, I dissent.

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receive a lesser amount of benefits or insurance coverage"); *id*, at § 1625.10(d) ("a plan or plan provision which prescribes lower benefits for older employees on account of age is not a 'subterfuge' within the meaning of 4(f)(2), provided that the lower level of benefits is justified by age-related cost considerations").

Opinion of the United States Court of Appeals
for the Sixth Circuit

(Reported at 848 F.2d 692)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 86-3676/4034
Decided and Filed June 3, 1988

* * *

JUNE M. BETTS,
Plaintiff-Appellee,

v.

HAMILTON COUNTY BOARD OF
MENTAL RETARDATION AND
DEVELOPMENTAL DISABILITIES
AND
OHIO PUBLIC EMPLOYEES
RETIREMENT SYSTEM OF OHIO,
Defendants-Appellants.

* * *

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF OHIO

Before: MERRITT, MARTIN and WELLFORD, Circuit Judges.

MARTIN, Circuit Judge, delivered the opinion of the court, in which MERRITT, Circuit Judge, joined. WELLFORD, Circuit Judge (pp. 7-19) delivered a separate dissenting opinion.

BOYCE F. MARTIN, JR., Circuit Judge. Defendants Hamilton County Board of Mental Retardation and Developmental Disabilities and Public Employees Retirement System of Ohio appeal from an order granting June

Betts' motion for summary judgment and declaratory judgment in this age discrimination case.

Betts worked for the Mental Retardation Department of Hamilton County and was covered by the state retirement system and the Age Discrimination in Employment Act, 29 U.S.C. § 621-34. Her work degenerated because of medical problems until she became disabled at age sixty-one. After negotiations, she was given the choice of two alternatives: an unpaid medical leave or length of service retirement. She was not offered disability retirement as a third choice. She was not allowed to have a disability pension because of a provision in Ohio's pension law preventing persons over sixty from receiving disability pensions and allowing them only to receive regular age retirement pensions.[1] Betts accepted length of service retirement and now receives $158.50 per month in benefits. A similarly situated younger employee would have been entitled to a disability benefit of $355.02 per month.

In granting Betts' motion for summary judgment, the district court held that the plan violated the Act. The district court found that the plan was discriminatory on its face and in its effect and did not qualify for the bona

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[1] Ohio Revised Code 145.35 provides:

> Application for disability retirement may be made by a member or by a person acting in his behalf, or by the member's employer provided the member has at least five years of total service credit and *has not attained age sixty* and is not receiving disability benefits under any other Ohio state or municipal retirement programs. (Emphasis added.)

fide employee benefits plan exception to the Act. Specifically, the district court concluded that the plan did not qualify under the exception because it is not the type of plan covered by the exception and because the defendants did not act in observance of the plan when they forced Betts into retirement because of her age.

Under 29 U.S.C. § 623(a)(1), an employer may not use age as a basis on which to discriminate against an employee in the compensation, terms, conditions, or privileges of employment. When there is direct evidence that a benefit plan discriminates on the basis of age, the plan is unlawful unless it falls within the bona fide employee benefit plan exception of 29 U.S.C. § 623(f)(2). In 1978, Congress further limited this exception by providing that plans that fall within the exception are nevertheless unlawful if they permit or require the involuntary retirement of an individual because of age.[2] In amending section 623(f)(2), Congress expressly repudiated the Supreme Court's decision and reasoning in *United Airlines v. McMann*, 434 U.S. 192 (1977), which held that a

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[2] Section 623(f)(2) now provides:

It shall not be unlawful for an employer . . .

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefits plan shall excuse the failure to hire any individual, and no such seniority system or employee benefits plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual;. . . .

bona fide benefit plan that treated older employees differently and predated the Act need not be justified by any business purpose. H. R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 8, *reprinted in* 1978 U.S. Code Cong. & Admin. News 504, 529. In light of this legislative intent, the district court noted that the "critical factor in [the] determination of whether defendants' plan is the type of plan exempted is whether it is based upon age-related cost factors as set forth in the regulatory interpretation of that section." 631 F.Supp. 1198, 1204 (S.D. Ohio 1986). *See* 29 C.F.R. 860.120(a)(1); 29 C.F.R. 860.120(f)(1)(iii).[3] We

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[3] 29 C.F.R. 860.120(a)(1) provides:

> The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefits plans where such reductions are justified by significant cost considerations. Accordingly, [29 U.S.C. § 623(f)(2)] does not apply, for example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified significant cost considerations. Where employee benefit plans do meet the criteria in [29 U.S.C. § 623(f)(2)], benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker even though the older worker may thereby receive a lesser amount of benefits or insurance coverage.

29 C.F.R. 860.120(f)(1)(iii) provides:

> [W]here the employees who are disabled at younger ages are entitled to long-term disability

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agree. Under the Act, an age-based benefit plan which denies disability retirement to older employees in favor of forcing length of service retirement is unlawful unless it can be justified by a substantial business purpose. As the Seventh Circuit recently declared, "where, as in the present case, the employer uses age – not cost, or years of service, or salary – as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of [29 U.S.C. § 623(f)(2)]." *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 319 (7th Cir. 1988). *Accord Equal Employment Opportunity Commission v. City of Mt. Lebanon, Pennsylvania*, 842 F.2d 1480, 1493 (3d Cir. 1988), ("By adding § 623(f)(2), Congress intended to relieve employers of the burden of providing equal benefits to all employees only when the cost of providing lower benefits to older workers is approximately equal to the cost of providing greater benefits to younger workers.").

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benefits, there is no cost based justification for denying such benefits altogether, on the basis of age, to employees who are disabled at older ages. It is not unlawful to cut off long-term disability benefits and coverage on the basis of some non-age factor, such as recovery from disability. Nor is it unlawful to terminate benefits or coverage, on the basis of age, at age 70. Reductions on the basis of age before age 70 in the level or duration of benefits available for disability are justifiable only on the basis of age-related cost considerations as set forth elsewhere in this section.

In her motion for summary judgment, Betts argued that the plan could not be justified by any business purpose. Under the disability plan, two employees with the same number of service years and the same final salary are treated identically unless one of the two employees is 60 or older. Betts argued that there was no economic justification for providing the younger employee with disability benefits while denying disability benefits to the older employee. To the contrary, Betts suggested that this arrangement is likely to cost the employer more because the employee who becomes disabled at a younger age should draw more in benefits over the course of his lifetime than the employee who becomes disabled at 60 or older.

Despite having every opportunity, the defendants declined to introduce any cost figures or other economic justification for the different treatment of employees over sixty. Consequently, the district court reached its conclusion that "the benefit package . . . is not justified by significant cost considerations" without the benefit of having the issue fully briefed by both parties. The defendants now argue that, at a minimum, this court should remand the case to allow them to put evidence before the district court concerning age-related cost considerations. The defendants do not contend that the district court prevented them from presenting evidence of cost considerations. *Cf. Cipriano v. Board of Education of City School District*, 785 F.2d 51 (2d Cir. 1986). In fact, the record indicates that, despite Betts' arguments that the plan cannot be justified by cost considerations, the defendants made no effort to submit any evidence on the subject. Consequently, we have no choice but to affirm the district

court's entry of summary judgment in favor of Betts; a non-moving party who, in the face of a motion for summary judgment, makes no effort to satisfy his burden of production is not entitled to a second opportunity to satisfy his burden once the motion has been granted.

Finally, we find that the district court did not abuse its discretion in awarding attorney's fees.

The judgment of the district court is affirmed.

WELLFORD, Circuit Judge, dissenting.

This is a difficult case in which plaintiff desires to obtain disability benefits which would give her a greater amount than would retirement benefits which she contends she was forced to seek. Betts was physically incapable of continuing public employment at age 61, and had only five years of active service with her employer at the time of retirement. She contends that the practice of defendants and their plan which carries out an Ohio statutory requirement violates the Age Discrimination in Employment Act (ADEA) (29 U.S.C. § 621 et seq.).

The defendants maintain that the plaintiff voluntarily retired due to her diabetic condition, and thus has no basis for her action asserting age discrimination. They also contend that Betts chose to retire instead of undergoing a medical examination, the result of which may have given the parties other options less favorable to Betts than forced retirement. Defendants also maintain they are carrying out the terms of a bona fide employee benefit or retirement plan which is exempt from ADEA requirements. (29 U.S.C. § 623(f)(2)). Defendants assert, in addition, that if plaintiff were, in effect, discriminated against

under the present law and regulations, defendants' practice under the plan in question pre-existed ADEA and is lawful. To put it another way, discrimination, if any, was due to length of service rather than age and was thus not in contravention of ADEA. PERS, moreover, contends that it is not an "employer" within the meaning of ADEA, and thus should not, in any event, be liable for imposition of plaintiff's attorney fees. I agree with the contentions of the defendants and, therefore, dissent from the view of other members of the panel.

The district court concluded that the plan was discriminatory on the basis of age, although in some respects it appeared to be justified. The district court also found that the claimed exemption from ADEA sought by the defendants did not apply. The Equal Employment Opportunity Commission has intervened and was permitted to participate by brief and by argument. It supports the position of the plaintiff. Defendants challenge the regulatory interpretation relied upon by the district court, 29 C.F.R. 860.120(a)(1) (1979)[1], in its decision published at

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[1] 29 C.F.R. 860.120(a)(1) provides in part:

> The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefits plans where such reductions are justified by significant cost considerations. Accordingly, section 4(f)(2) does not apply, for example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified by significant cost considerations. Where employee benefit plans do meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers.

631 F. Supp. 1198 (N.D. Ohio 1986). The district court discussed this regulatory interpretation in considering "the critical factor in our determination of whether defendants' plan is the type of plan exempted [under ADEA] . . . based upon age-related cost factors." *Id.* at 1204. Not surprisingly the EEOC's brief supports its "guidelines" which it contends are in accord with its regulatory interpretation and which it asserts provides "that an employer can demonstrate that a plan provision is 'not a subterfuge' and is consistent with the Act's purpose, by showing that 'the lower level of benefits is justified by age-related cost considerations.' 29 C.F.R. 860.120(d)."

Betts filed an original complaint in this case on June 14, 1985, on the same day that she filed her charge against defendants. 29 U.S.C. § 626(d) provides, in pertinent part, that "[n]o civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission." The original complaint obviously was not in compliance with § 626(d). Plaintiff, however, filed an amended complaint of similar import on October 9, 1985, more than 60 days after the filing of her charge. We have ruled that the above 60 day provision along with 29 U.S.C. § 633(b) comprise "substantive limitations on the rights of plaintiffs, . . . are analogous to statutes of limitations . . . [and] ADEA's filing and deferral provisions specify a time *before* which no action may be brought." *Whitfield v. City of Knoxville*, 756 F.2d 455, 461 (6th Cir. 1985). *See also Vance v. Whirlpool Corp.*, 707 F.2d 483, 487 (4th Cir. 1983), *cert. denied*, 465 U.S. 1102 and 467 U.S. 1226 (1984) ("Congress intended conciliation efforts under § 626(d) to be a strict condition

precedent to the initiation of any litigation in federal courts," and "an absolute period of abstention by the federal judiciary.") The contemporaneous filing of the original action together with the ADEA charge was clearly barred by § 626(d). There is a serious question as to whether plaintiff cleared this ADEA hurdle by later filing, after 60 days had expired, a similar amended complaint. The district court and the majority have not addressed this jurisdictional problem, which may be a basis for dismissal.

Plaintiff's application for disability retirement was denied under the following language of Ohio Rev. Code § 145.35:

> Application for disability retirement may be made by a member or by a person acting in his behalf, or by the member's employer provided the member has at least five years of total service credit and *has not attained age sixty* and is not receiving disability benefits under any other Ohio state or municipal retirement program.

(Emphasis added.)

As observed by the district court, the defendants' disability retirement plan "provides that a retirant shall receive a retirement benefit in an annual amount no less than thirty percent of the retirant's final average salary. *See* Ohio Rev. Code § 145.36." 631 F. Supp. at 1202. ADEA § 623(a)(1) precludes discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." The district court concluded that defendants' retirement plan had a "disparate impact" upon individuals such as plaintiff despite its finding that there was no "ill

will" directed towards plaintiff "or anyone in the protected group," and despite its observation that "at first glance, the plan appears to be eminently just." *Id.* at 1202. The district court conceded that such disparate impact occurred only in the situation where one sixty years or older had not accumulated sufficient "voluntary" retirement benefits by reason of length of service to attain thirty percent of final salary.

The district court also concluded that the exception under 29 U.S.C. § 623(f)(2)[2] did not apply. Giving "great deference" to EEOC guidelines, including 29 C.F.R. 860.120(f)(1)(iii),[3] the court held that because the plan

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[2] 229 U.S.C. § 623(f)(2) provides, in part:

> It shall not be unlawful for an employer . . .
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual;. . . .

[3] 29 C.F.R. 860.120(f)(1)(iii) provides in part:

> [W]here employees who are disabled at younger ages are entitled to long-term disability benefits, there is no cost based justification for denying such benefits altogether, on the basis of age, to employees who are disabled at older ages. It is not unlawful to cut off long-term disability benefits and coverage on

(Continued on following page)

denied "long term disability benefits on the basis of age," defendants could not prevail. *Id.* at 1203. Defendants' argument that its plan afforded a "legitimate retirement option," and was therefore exempted, was not specifically addressed by the district court because "even if the benefit package merely permits an age-based reduction," it was held not to be "the type of plan contemplated by the exemption." *Id.* at 1204. The district court analogized plaintiff's position of "forced retirement" to that of "constructive discharge" despite plaintiff's concession that she was faced with options to retire or be terminated because of "poor job performance" and "apparent medical problems." *Id.* at 1204. Also, because the plan did not contain an "express provision for involuntary retirement, at the employer's option", before attaining age seventy, the district court held that defendant employer "did not observe the terms of the plan when it forced plaintiff to retire." *Id.* at 1205.

Applying Title VII criteria to this action, and citing *Morelock v. NCR Corporation*, 546 F.2d 682 (6th Cir. 1976) and *Tipler v. E. I. duPont deNemours & Co.*, 443 F.2d 125, 131 (6th Cir. 1971), the district court held that PERS was an employer within the meaning of the act, although not

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> the basis of some non-age factor, such as recovery from disability. Nor is it unlawful to terminate benefits or coverage, on the basis of age, at age 70. Reductions on the basis of age before age 70 in the level or duration of benefits available for disability are justifiable only on the basis of age-related cost considerations as set forth elsewhere in this section. . . .

one "in conventional terms . . . because it controls some aspects of plaintiff's compensation . . . and privileges of employment." *Id.* at 1206. Both defendants appeal the consequent grant of summary judgment to plaintiff, although PERS did not pursue on appeal the question of its employer status under ADEA.

Other courts have recently considered the interesting questions presented in this appeal. See *EEOC v. State of Maine and Maine State Retirement System*, 823 F.2d 542 (1st Cir. 1987) (affirming without opinion the district court's dismissal of an ADEA claim where members of the plan, state employees, were similarly restricted from retirement disability benefits unless permanently disabled before reaching age sixty, see *EEOC v. State of Maine, et al.*, 644 F. Supp. 223 (D. Me. 1986)). These decisions in the *State of Maine* case were not available to Judge Speigel whose opinion pre-dated them. See also *Foster v. Board of Trustees of the Maine Retirement System*, No. CV-86-24 (Maine Super. Ct. Aug. 6, 1986).

A similar result was reached in a case involving like challenge to a group life insurance program which provided disability benefits only to employees who became disabled prior to reaching age sixty. See *EEOC v. Cargill, Inc.*, No. 81-4193 (D. Kan. Oct. 12, 1984), *appeal docketed*, No. 84-2692 (10th Cir. Dec. 10, 1984). In *Cargill*, District Judge Saffels considered amended § 623(f)(2) of ADEA in light of its legislative history and concluded that the plan at issue was not a "subterfuge" and was bona fide despite the fact that Cargill's plan had been amended after the passage of ADEA, but not in respect to the disability feature. (A similar contention is made by Betts that defendants had amended the plan in question after ADEA

became effective). The district court in *Cargill* granted defendant summary judgment holding that the provision in question "was instituted in good-faith prior to the passage of ADEA."[4] See also *International Bhd. of Elec. Workers v. Union Elec. Co.*, 585 F. Supp. 261 (W.D. Mo. 1984), *aff'd*, 761 F.2d 1257 (8th Cir. 1985) and *Alford v. City of Lubbock, Texas*, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) for the proposition that a plan, adopted *before* ADEA came into effect, which might seem on its face to discriminate against older employees was deemed not to be a subterfuge within the meaning of § 623(f)(2) citing *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977). The majority does not address these cases dealing with this statutory provision.

No disparate treatment nor intentional discrimination on the part of defendants has been demonstrated in this case.[5] The court concluded rather that "defendants' disability retirement plan has a disparate impact upon individuals in the protected age group." 631 F. Supp. at 1202. The district court did note that the purpose and effect of the plan was to deny "benefits to certain employees because they are sixty years of age or older." *Id.* at 1202, citing *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984). *Borden's* involved a plant closing and whether

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[4] *Cargill* has been appealed to the Tenth Circuit Court of Appeals and oral argument has been heard. No decision has yet been rendered.

[5] The district judge noted no "ill will" by reason of age demonstrated; that the plan "preserved career opportunities" and in some respects "appears to be eminently just." 631 F. Supp. at 1202.

certain employees fifty-five or older were discriminatorily denied severance pay under ADEA. Two questions were presented, the first "whether Borden's policy of denying severance pay to employees eligible for retirement" violated ADEA, and the second, "whether Borden's severance pay policy qualifies for the 'bona fide employee benefit plan' exception under . . . 29 U.S.C. § 623(f)(2)." *Borden's*, 724 F.2d at 1392. The *Borden's* court found disparate treatment in addition to affirming the district court's disparate impact analysis because "Borden's purposefully drafted its severance pay policy," 724 F.2d at 1393, and held that there was no further need to show a discriminatory animus, citing other Ninth Circuit decisions. Such a holding necessarily examines the impact of a plan upon a particular employee or group of employees of a certain age, and implies a discriminatory animus or intent from the adoption of language in a plan that sets forth eligibility for severance benefits based upon age or length of service. The *Borden's* court acknowledged that the retirement benefits afforded the claimants were of greater value than the severance pay which was granted to employees who were not entitled, because of their younger age, to retirement benefits. The plant closing in *Borden's* brought about a *forced retirement or termination of all employees* there situated at the time of closure. That economic factors may have motivated the actions of the employer and its plan policies were deemed immaterial "since Borden is not arguing that its policy was economically necessary", *id.* at 1394. The other basis for decision in *Borden's* was that the "severance pay policy" in question was "not a 'plan' " within the meaning of § 623(f)(2), because it was a "one-time, ad hoc cash

payment." *Id.* at 1395, 1396. I find *Borden's* rationale unpersuasive, and conclude that it does not apply to the very different set of circumstances involved in this case where the policy at issue is clearly that involved in an ongoing plan, not just a "one-shot, ad hoc" action outside the "meaning of § 623(f)(2)" as found in *Borden's*.

The district court concluded that the plan in question did not qualify for the § 623(f)(2) exemption because it did not meet certain of the following required criteria which it found must be established:

> (1) it must be the sort of "plan" covered by the exemption;
>
> (2) it must be "bona fide," which means that it exists and pays substantial benefits;
>
> (3) the defendants' act must be in observance of its plan;
>
> (4) the plan must not be a subterfuge to evade the purposes of the act.

631 F. Supp. at 1203. The district court found the plan to be a bona fide one. It was a "bona fide employee benefit plan," of the kind defined in 29 U.S.C. § 623(f)(2).

However, the district court found that the action taken with regard to Betts was akin to a constructive discharge and that this action ("involuntary retirement") was not a part of the terms of the plan, thus defendants had not "observed" the plan, another of the four criteria.

It is clear, however, that Betts was not rendering satisfactory service in the several positions in which she had been placed during her approximate five years of service. She knew that she faced the potentiality of a forced medical leave under the terms of her employment

and the established policy of the defendant employer. She was given an option, on the other hand, under the plan "to voluntarily retire and continue to have medical benefits." See Stipulation #10. Betts had ten days to make a decision after being furnished information about the options available to her. Her daughter was also fully advised about the options under the plan. It was further stipulated that age was not a factor in the decision about requiring a medical examination and the potentiality of a forced medical retirement. The constructive discharge analogy is inappropriate as herein pointed out.

The fact that a "forced" medical retirement might have been one option available to Betts, due not to her age but rather her condition of health, and that another retirement option was available to her which she voluntarily chose in which the amount of benefits depended primarily upon length of service, is the significant consideration. I would find that the retirement involved in this case was a voluntary one.

Even if there were found a discriminatory impact upon Betts, a constructive discharge analogy is simply not appropriate in this case. This is not a case of difficult, unpleasant or intolerable working conditions being imposed upon plaintiff. *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982); *Williams v. Caterpillar Tractor Co.*, 770 F.2d 47 (6th Cir. 1985); *Geisler v. Folsom*, 735 F.2d 991 (6th Cir. 1984).

The Board's actions as an employer did not constitute an equivalent to a "constructive discharge" of Betts; its actions were "in observance of its plan." The district court's contrary conclusion was in my view erroneous.

Therefore, I would conclude that defendants did meet the criterion of observing, and not departing from, the terms of its plan.

For the reasons stated in the *Cargill* and *Maine* cases, and because the plan, when adopted and as implemented, was bona fide and not a "cover" or a scheme to discriminate by reason of age against employees in the position of plaintiff, I would further conclude that it was not a "subterfuge to evade the purposes" of ADEA. The definition of "subterfuge," in § 626(f)(2), is a "scheme, plan, strategem, or artifice of evasion" as set out in *United Air Lines, Inc. v. McMann*, 434 U.S. at 203. Since defendants' plan was adopted long before ADEA became law, it was not a subterfuge to evade old age discrimination. The third of the criteria was met in that respect.

The final criterion necessary for a plan to come within the exemption of 29 U.S.C. § 623(f)(2) is whether this was the "sort of 'plan' covered by the exemption." 631 F. Supp. at 1203. *Borden's*, a principal authority relied upon by the district court, which considered a "one shot" severance pay arrangement, has been distinguished. Another principal authority cited by the district court in finding the plan in question not to be the "sort" intended by § 623(f)(2) is *EEOC v. Westinghouse Elec. Corp.*, 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984). In *Westinghouse*, the court concluded that the layoff income benefit denied to workers at least 55 years of age was "functionally independent of the Pension Plan," because "[t]he mere fact that benefits available to employees under the Pension Plan were to be considered when determining eligibility for LIB, however, does not merge the two plans into a single 'coordinated benefit plan.'

EEOC v. Borden's Inc., 551 F. Supp. 1095, 1099 (D. Ariz.) *appeal docketed*, No. 83-1701 (9th Cir. Feb. 17, 1983)." 725 F.2d at 225. *Westinghouse* is also distinguishable. In the instant case, there was a coordinated plan and policy tied to a determination of benefits which a medically disabled worker might seek. The amount of the benefit in this case was essentially tied to an employee's length of service with the employer; it obviously sought to encourage long term employment, and it was not designed to discriminate against the hiring of an older worker, as evidenced by the defendant's hiring of Betts at age 55. Defendants' retirement benefit plan is the sort of plan contemplated by 29 U.S.C. § 623(f)(2), contrary to the conclusion of the district court. See *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974). *Alford v. City of Lubbock, Texas*, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) is not to the contrary because withholding of older employees' accumulated and accrued 90-day sick pay benefits is not comparable to the disability retirement plan and policy here involved.

EEOC and the district court find support for finding a violation of ADEA because of 29 C.F.R. 860.120(a)(1) and 29 C.F.R. 860.120(f)(1)(iii). Their position is that the limitation imposed upon disability retirement benefits under the plan "is not justified by significant cost considerations and therefore . . . is not the type of plan contemplated by the [§ 623(f)(2)] exemption.". 631 F. Supp. at 1204.

The two regulations make reference to "significant cost considerations" in order to justify "age-based reductions in employee benefits plans" or denying benefits to

"employees who are disabled at older ages." The statutory exemption itself, 29 U.S.C. § 623(f)(2) sets out, in essence, only that there be a "bona fide seniority system or any bona fide employee benefit plan . . . not a subterfuge to evade the purpose of [the Act]" and that such plan not "require or permit . . . involuntary retirement . . . because of . . . age." Under the statute the plan at issue is bona fide and not a subterfuge set up to evade ADEA. The plan did not require or make reference to age-based involuntary retirement; rather Betts was afforded a choice or option under the plan and the policy of defendants, and her benefits were less than others because of her comparative short length of employment service rather than age per se. Compare the plan in *TWA v. Thurston*, 469 U.S. 111 (1985). The plan in question did not, unlike the *TWA* plan, permit defendants involuntarily to retire Betts. It did permit a medical layoff if her state of health was insufficient to allow her to work satisfactorily, subject to medical treatment or possible curative effect of time, with right of reinstatement. The plan did not involve involuntary retirement as contended by Betts.

In sum, the plan meets the requirements of § 623(f)(2), because it is bona fide, not a subterfuge to evade ADEA, and does not involve the forced retirement of Betts, as was the situation involved in *EEOC v. Chrysler Corp.*, 733 F.2d 1183, *reh'g denied*, 738 F.2d 167 (6th Cir. 1984), another case relied upon by plaintiff. In *Chrysler*, forced retirees were not permitted to have the option available to younger employees (under 55 years old) of "layoff status." *Chrysler* held that forced retirement, imposed on older employees only, with no other option

available, by reason of "economic necessity," constituted a violation of ADEA under the facts of that case. *Chrysler* involved employees with at least ten years of service. As pointed out by defendant PERS, an age and service retirement under Ohio law is granted the option of quitting retirement and returning to service with any public employer in Ohio, including, but not limited to defendant employer. See Ohio Rev. Code § 145.381. Defendants therefore, unlike the *Chrysler* and *TWA* cases, could not force Betts into permanent retirement since, under Ohio law, she could be reemployed by other State of Ohio agencies.

I conclude that neither regulation relied upon by the district court and by Betts is in accord with statutory purpose and adds a dimension, economic cost justification, *not* in the statute. I agree, therefore, with *EEOC v. State of Maine, supra,* and with *EEOC v. Cargill,* that a plan of this type does come within the exemption of 29 U.S.C. § 623(f)(2), and, therefore, does not violate ADEA. This plan falls within this plain statutory exemption language without the need to analyze legislative history.[6]

Since I conclude that the plan in question does not constitute a violation of ADEA, I would set aside any award of attorney fees to Betts' counsel.

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[6] If, however, one were to examine the legislative history of the 1978 amendment, reflected in § 623(f)(2) as set out in note 2, *supra,* one would find that the purpose was to preclude involuntary retirement on account of age. To that extent Congress intended to overrule *United Air Lines, Inc. v. McMann,* 434 U.S. 192 (1977).

I would therefore REVERSE the decision of the district court for the reasons indicated.

Opinion and Order of the United States District Court, Southern District of Ohio, Western Division (Reported at 631 F. Supp. 1198)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION

No. C-1-85-1108

Filed March 27, 1986

* * *

JUNE BETTS,

Plaintiff,

v.

HAMILTON COUNTY BOARD OF MENTAL RETARDATION, et al.,

Defendants.

* * *

OPINION AND ORDER

SPIEGEL, J.:

This matter came on for consideration of the motion for summary judgment and declaratory judgment filed by plaintiff (doc. 6), memorandum in opposition by defendant Hamilton County Board of Mental Retardation and Developmental Disabilities (HCBMRDD) (doc. 10), and by defendant Public Employees Retirement System of Ohio (PERS) (doc. 11), supplement to memorandum in opposition by defendant PERS (doc. 12), reply memorandum to documents 10 and 11 by plaintiff (doc. 14), reply memorandum by defendant HCBMRDD (doc. 22), and supplementary memorandum on summary judgment by plaintiff (doc. 18). The defendants PERS and HCBMRDD have also filed their cross-motions for summary judgment

(docs. 21 and 26) to which plaintiff has filed her memorandum in opposition (doc. 28) and the defendant PERS has filed its response (docs. 29 and 30).

This is an action for lost benefits and payment of attorney fees arising out of an alleged violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.* which provides in part:

> § 623(a) It shall be unlawful for an employer
>
> –
>
> (1) to . . . otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . .

Plaintiff alleges that defendants HCBMRDD and PERS violated the above-quoted section of the ADEA by compelling plaintiff to involuntarily retire by denying her disability retirement benefits because of her age.

Defendants make the following assertions in their responses to plaintiff's motion for summary judgment and in their own motions for summary judgment. First, defendants maintain that plaintiff voluntarily retired in June 1985 and that such voluntary retirement precludes an action for age discrimination. Defendants argue plaintiff voluntarily chose to retire instead of undergoing a medical examination to prove the need for placing her on a medical leave of absence and therefore, age was not a factor in the events giving rise to this litigation. Second, defendants maintain that even if plaintiff was discriminated against on the basis of age, its practice of denying disability retirement benefits to individuals sixty-years of

age and over was consistent with the laws and regulations in effect in June 1985, that the disability retirement plan pre-existed the promulgation of the ADEA, and such discrimination is permissible under 29 U.S.C. § 623(f)(2) which provides:

> It shall not be unlawful for an employer, employment agency or labor organization –
>
> . . . (2) to observe the terms of . . . any bona fide employee benefits plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefits plan shall . . . permit the involuntary retirement of any individual [40 years of age but less than 70 years of age] because of the age of such individual . . .

Finally, defendant PERS maintains that it is not an "employer" for the purposes of the ADEA, and therefore, cannot be held accountable for any discriminatory practices.

In considering a motion for summary judgment, the narrow question we must decide is whether there is "no genuine issue as to any material fact and [whether] the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. The Court cannot try issues of fact on a Rule 56 motion, but is empowered to determine only whether there are issues to be tried. *In re Atlas Concrete Pipe, Inc.*, 668 F.2d 905, 908 (6th Cir. 1982). The moving party "has the burden of showing *conclusively* that there exists no genuine issue as to a material fact and the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion." *Smith v. Hudson*, 600 F.2d 60, 63 (6th Cir.) (emphasis original), *cert. denied*, 444 U.S. 986

(1979). And, "while the movant's papers are to be closely scrutinized, those of the opponent are to be viewed indulgently." *Id.* at 63. "[T]he District Court [is] obligated to consider not only the materials specifically offered in support of the motion, but also all 'pleadings, depositions, answers to interrogatories, and admissions' properly on file and thus properly before [the] court." *Id.*, quoting Rule 56(c), Fed. R. Civ. P. Summary judgment "must be used only with extreme caution for it operates to deny a litigant his day in court." *Id.*

For purposes of the cross-motion for summary judgment, the following facts were stipulated. In addition, the parties have fully briefed the issues, provided the Court with the applicable sections of the Ohio Revised Code setting forth the public employee retirement system at issue, and have presented their positions through oral arguments before the Court.

Plaintiff was sixty-one years of age and a six-year member of PERS when she was denied disability retirement benefits. For approximately five years, plaintiff was employed as a speech pathologist for defendant HCBMRDD. In 1984, plaintiff was not satisfactorily performing her duties as a speech pathologist and voluntarily accepted a transfer to the Beckman Adult Center to be employed as a workshop specialist. By September 1984, plaintiff was unable to satisfactorily perform her new job duties, apparently due to medical reasons. As a result, she voluntarily accepted a position as a Teachers' Aid with defendant HCBMRDD at a lower salary. By late May 1985, plaintiff's apparent medical problems continued and she was unable to perform her duties as a Teachers' Aid. At that time, HCBMRDD supervisory staff

advised plaintiff that she could choose to voluntarily retire within ten days or they would begin steps to force her to take a medical leave of absence. Voluntary retirement would provide plaintiff with $139.14 per month income and continued medical benefits, while forced medical leave was without pay or medical benefits.

Subsequently, plaintiff's daughter contacted HCBMRDD and inquired about the possibility of her mother obtaining disability retirement benefits. She was told that the defendant PERS should be contacted, as it alone makes the determination of eligibility for disability retirement. On June 3, 1985, plaintiff met with HCBMRDD personnel and reviewed the only options available to her; that is voluntary retirement or forced medical leave. That same date, she signed a letter stating her intention to retire. Eleven days later, plaintiff filed an age discrimination charge with the Equal Employment Opportunity Commission (EEOC) against the defendants.

Shortly thereafter, plaintiff filed with HCBMRDD her application for disability retirement, a report of her attending physician indicating that she was permanently disabled, and a letter requesting HCBMRDD to disregard her letter of June 3, 1985. Plaintiff's application for disability retirement was denied pursuant to Ohio Rev. Code § 145.35 which provides in part:

> Medical examination for disability retirement; reinstatement of persons not disabled.
>
> Application for disability retirement may be made by a member or by a person acting in his behalf, or by the member's employer provided the member has at least five years of total service credit and *has not attained age sixty* and is

> not receiving disability benefits under any other Ohio state or municipal retirement programs. (Emphasis added.)

The disability retirement plan provides that a retirant shall receive a retirement benefit in an annual amount no less than thirty percent of the retirant's final average salary. See Ohio Rev. Code § 145.36. Moreover, a disability retirant retains his membership status in PERS and is considered on leave of absence from his position during the first five years on the retired list. Within that period, he can be restored to his previous position and salary or to a similar position and salary. Ohio Rev. Code § 145.39. Had plaintiff qualified for disability retirement, she would have received $355.02 per month based upon thirty percent of her final average annual salary of $14,260.00 and would have been eligible for reinstatement at a comparable salary and position within the first five years of retirement in the event her disability ceased. To the contrary, plaintiff is receiving $158.50 per month on "voluntary retirement", based upon her six years of membership in the PERS and is ineligible for regular reemployment in any capacity pursuant to the voluntary and compulsory retirement provisions of Ohio Rev. Code § 145.32.

The ADEA forbids an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). There are two methods of proving age discrimination. The most easily understood type of discrimination is "disparate treatment" which is evident when the employer treats some people less favorably than others because of their

age. In a disparate treatment case, proof of discriminatory motive is critical. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-266 (1977). A second method of proving age discrimination is by demonstrating that the use of a facially neutral employment practice or the use of subjective criteria had a disparate impact on individuals in the protected age group. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Intent need not be shown in a discriminatory impact case. *International Brotherood of Teamsters v. United States*, 431 U.S. 324 (1977).

We conclude that defendants' disability retirement plan has a disparate impact upon individuals in the protected age group. On its face and in its effect, the disability retirement plan denies benefits to certain employees because they are sixty years of age or older, and we may assume that the plan was purposefully drafted to have that effect. *EEOC v. Bordens, Inc.*, 724 F.2d 1390 (9th Cir. 1983). That is not to say, nor do we find any evidence in the record, that there was any ill will on the part of the defendants toward plaintiff or anyone in the protected group because of their age. In that respect, we find that this is a difficult case. It may well be that the plan was designed to discriminate on the basis of length of services rather than upon age. For example, a sixty-year-old individual with thirty years of service, who would not be eligible for disability retirement benefits, may receive higher monthly benefits and fare better than a younger individual collecting disability retirement, based upon his accumulated voluntary retirement benefits. At first glance, the plan appears to be eminently just, as it provides disability benefits to those younger individuals

who become permanently disabled and who would otherwise have no source of income during their disability. It also preserves any career opportunities an individual has obtained through his employment during the first five years of his disability. In addition, a sixty-year-old permanently disabled individual, who has served the public for many years, would be sufficiently compensated through voluntary retirement. However, these virtues of the plan are diminished when similarly situated individuals, but for their age, are compared. For example, the plan discriminates between a fifty-nine-year-old or twenty-five-year-old permanently disabled individual with six years of service and a person sixty years of age or older with an identical disability, average annual salary, and length of service, because they would not receive identical monthly benefits or the option of returning to work if their disability ceases. The discrepancy in monthly benefits and lack of opportunity to return to work is based solely upon age, as the sixty-year-old individual is precluded from seeking the option of disability retirement. The important factor in our analysis is the disparate impact that defendants' disability retirement plan has upon individuals, such as plaintiff, who are in the protected age group and who have not accumulated sufficient retirement benefits to compensate for the denial of disability benefits, based solely upon their age. In that regard, the plan is discriminatory on the basis of age.

The foregoing conclusion, however, does not resolve the question before us, as some types of age discrimination are permissible under the ADEA. Our second inquiry

is whether defendants' disability retirement plan qualifies for the "bona fide employee benefits plan" exception under the ADEA, 29 U.S.C. § 623(f)(2), which provides:

> It shall not be unlawful for an employer . . .
>
> > (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefits plan shall excuse the failure to hire any individual, and no such seniority system or employee benefits plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; . . . .

In order for defendants' plan to qualify under the exemption, it must meet the following four criteria: (1) it must be the sort of "plan" covered by the exemption; (2) it must be "bona fide," which means that it exists and pays substantial benefits; (3) the defendants' act must be in observance of its plan; (4) the plan must not be a subterfuge to evade the purposes of the act. Finally, even if defendants' plan meets the four criteria, it may not "require or permit involuntary retirement of any such individual . . . because of the age of such individual." 29 U.S.C. § 623(f)(2).

A plan qualifies under the exemption if it is a retirement, insurance, or pension plan. However, that list is not exclusive. *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 215 (5th Cir. 1974). Retirement, pension, and insurance are merely examples of the types of plans in which Congress intended to allow age distinctions. *EEOC v. Westinghouse Electric Corporation*, 725 F.2d 211, 224 (3d Cir. 1983).

Contrary to complex, ongoing benefit schemes, simple fringe benefits such as severance pay policies, *see EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984), lay-off insurance and benefits, *see EEOC v. Westinghouse Electric Corp.*, 725 F.2d at 211, and payment for accrued unused sick leave, *see Alford v. City of Lubbock*, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982), are not excepted under the exemption. *See also* 29 C.F.R. 860.120(a)(1). Moreover, the EEOC guidelines specifically prohibit denial of long term disability benefits on the basis of age. 29 C.F.R. 860.120(F)(1)(iii).[1] Such an administrative interpretation of the ADEA is entitled to great deference. *Griggs*, 401 U.S. at 433. We find that the "disability retirement" plan in question here is difficult, at best, to categorize. On the one hand, defendants point out that their disability retirement plan continues indefinitely, and therefore, they argue, it is a legitimate retirement option, specifically exempted from the ADEA. On the other hand, we cannot

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[1] 29 C.F.R. 860.120(F)(1)(iii) provides in part:

> [W]here the employees who are disabled at younger ages are entitled to long-term disability benefits, there is no cost based justification for denying such benefits altogether, on the basis of age, to employees who are disabled at older ages. It is not unlawful to cut off long-term disability benefits and coverage on the basis of some non-age factor, such as recovery from disability. Nor is it unlawful to terminate benefits or coverage, on the basis of age, at age 70. Reductions on the basis of age before age 70 in the level or duration of benefits available for disability are justifiable only on the basis of age-related cost considerations as set forth elsewhere in this section
>
> . . . .

ignore the fact that defendants' plan has the salient features of a disability plan, as a disability retirant must be permanently disabled or presumed to be permanently disabled and may be restored to his former position and salary if his disability ceases within five years. In essence, the disability retirant is considered on leave of absence for the first five years of his retirement. Ohio Rev. Code §§ 145.35 and 145.39. We find it unnecessary to determine whether the plan in question is a disability plan, excepted from the exemption, or whether it is a retirement plan, specifically covered by it. The critical factor of plan determination of whether defendants' plan is the type of plan exempted is whether it is based upon age-related cost factors, as set forth in the regulatory interpretation of that section.

> The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefits plans where such reductions are justified by significant cost considerations. Accordingly, section 4(f)(2) does not apply for example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified significant cost considerations. Where employee benefit plans do meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers.

29 C.F.R. 860.120(a)(1).

Plaintiff argues that the exemption does not apply because the plan does more than reduce benefits, as individuals at a certain age are precluded from receiving disability retirement benefits altogether, and in any event,

such "reductions" are not based upon significant cost considerations. Plaintiff argues that contrary to insurance and pension plans, it would cost no more to provide disability benefits to a sixty-one-year-old employee than a twenty-five-year-old employee, provided both had the same number of service years and final average salary. Indeed, a twenty-five-year-old retirant would receive much more in the way of monetary benefits over his lifetime than one who became disabled at sixty-one.

As to plaintiff's first argument, we are uncertain whether defendants' benefit package, when taken as a whole, does more than permit an age-based reduction in employee benefits. While persons sixty years of age and older are precluded from disability benefits, they are eligible for voluntary retirement. However, we do not reach that issue because we agree with plaintiff that even if the benefit package merely permits an age-based reduction, it is not justified by significant cost considerations and therefore, it is not the type of plan contemplated by the exemption.

As to the second requirement for qualifying for the exemption, an employee benefits plan is bona fide if it exists and pays substantial benefits. *Carpenter v. Continental Trailways*, 635 F.2d 578 (6th Cir. 1980). If defendants' plan was the type of plan exempted by section 4(f)(2), we would have little difficulty concluding that it was bona fide.

However, we conclude that other requirements were not met because defendants' act was not in observance of the plan and the plan impermissibly requires or permits involuntary retirement on the basis of age. For purposes

of our analysis, these two factors are closely related. Defendants contend that the central question in this litigation is whether plaintiff has presented sufficient evidence to permit a reasonable fact-finder to conclude that age was a factor in the actions taken by HCBMRDD against her personally. The thrust of their argument is that plaintiff was given the option of voluntary retirement or a medical leave of absence, solely because of her poor job performance due to apparent medical problems. Plaintiff does not dispute that fact. However, central to plaintiff's argument, and of utmost importance to our analysis, is the impact that defendants' disability retirement plan has upon individuals such as plaintiff who are in the protected age group. Because of plaintiff's age, she was presented with two options rather than three. Those options were "voluntary retirement" or forced medical leave. The former option provides retirement and medical benefits. The latter option provides neither. We conclude that the situation is analogous to constructive discharge which arises when working conditions are so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign. *See Jacobs v. Martin Sweets Co., Inc.*, 550 F.2d 364 (6th Cir. 1977). In essence, plaintiff was presented with a choice of early retirement or nothing (a livelihood or none), and we therefore conclude that plaintiff was forced into retirement because of her age.

In 1978, section 623(f)(2) was amended in part, to include the following language:

> and no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such

> individual. 29 U.S.C. § 623(f)(2) as amended, Pub. L. 95-256 § 2(A), Apr. 6, 1978, 92 Stat. 189.

The amendment to the ADEA, forbidding forced early retirement in essence overruled the Supreme Court's decision in *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977), which held that the ADEA did not prohibit early retirement pursuant to a mandatory retirement provision in a bona fide plan, even if the sole basis for early retirement is age. *See EEOC v. Chrysler Co.*, 733 F.2d 1183, 1185 (6th Cir. 1984). We conclude that the amendment should be applied to this case because plaintiff retired in 1985 and we are to apply the laws as it stood when the controversy arose. *Carpenter*, 635 F.2d at 580. Having concluded that the plan requires or permits the involuntary retirement of an individual because of his age, we need not address the issue of whether or not the plan is a subterfuge to evade the purposes of the ADEA.

However, we note that even if this controversy had arisen prior to the 1978 amendment, the exemption would not apply because defendants did not act in observance of the plan. Congress' intent in enacting section 4(f)(2) was to permit involuntary termination only if the employee benefit plan specifically provides for it. *Sexton v. Beatrice Foods, Co.*, 630 F.2d 478 (7th Cir. 1980).

> [A]n employer does not observe the terms of the plan unless the plan expressly sanctions the decision to force the employee to retire early as well as the decision to pay him substantial benefits. Both of these decisions must be pursuant to some express provision in the plan if the employer wishes to claim that he observed the terms of the plan by forcing an employee to retire early.

Id. at 486.

Under the PERS, the normal retirement date is the thirtieth day of June of any year a member of the system has attained the age of seventy. A member who has passed his sixtieth birthday and has five or more years of total service credit, may elect early retirement. However, the PERS does not contain an express provision for involuntary retirement, at the employer's option, before an employee attains the age of seventy. Therefore, the employer did not observe the terms of the plan when it forced plaintiff to retire.

For the foregoing reasons, we conclude that the disability retirement plan conflicts with, and is in violation of the ADEA. In 1974, the ADEA was amended to extend coverage to state and local employees.[2] In *EEOC v. Wyoming*, ___ U.S. ___, 103 S. Ct. 1054 (1983), the Supreme Court held that the extension of the ADEA to cover state and local governments is a valid exercise of Congress' powers under the Commerce Clause and is not precluded by the Tenth Amendment. *Id.* To the extent that the 1978 ADEA amendments conflict with existing state statutes, the Supremacy Clause dictates that federal law prevail.

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[2] *See, e.g.*, H.R. Rep. No. 913, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 2811, 2850 ("The committee expects that expanded coverage under the Age Discrimination in Employment law will remove discriminatory barriers against employment of older workers in government jobs at the Federal and local government levels as it has and continues to do in private employment."); 120 Cong. Rec. 8768 (1974) (remarks of Senator Benson) ("The passage of this measure insures that Government employees will be subject to the same protections against arbitrary employment based on age as are employees in the private sector.").

Orzell v. City of Wauwatosa Fire Dept., 697 F.2d 743, 752 (7th Cir. 1983).[3]

Finally, we must determine whether PERS is an "employer" within the meaning of the ADEA, and therefore, can be held liable for discriminatory practices on the basis of age. PERS argues that it cannot be defined as an employer because it is independent of HCBMRDD and is only involved to the extent that it receives county contributions to the pubiic employees retirement system pursuant to Ohio Rev. Code § 145.48.

The ADEA, inter alia, prohibits employers from discriminating on the basis of age. Employer is defined to include a person engaged in an industry affecting commerce employing a specified number of employees for a specified period of time, and any agent of such person. 29 U.S.C. § 630(b). Plaintiff asserts that criteria employed in determining liability under Title VII of the 1964 Civil Rights Act should be applied to cases arising under the ADEA. In *Morelock v. NCR Corporation*, 546 F.2d 682 (6th Cir. 1976), our parent circuit noted that the "ADEA is an offspring of the Civil Rights Act of 1964" and that "[t]he prohibitions of the ADEA are in terms virtually identical to those of Title VII of the Civil Rights Act of 1964, except

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[3] *See also* 29 C.F.R. § 1625.6(c) (1981 Supp.):

> Many State and local governments have enacted laws or administrative regulations which limit employment opportunities based on age. Unless these laws meet the standards for the establishment of a valid bona fide occupational qualification under section 4(f)(1) of the Act, they will be considered in conflict with and effectively superseded by the Act.

that 'age' has been substituted for 'race, color, religion, sex or national origin.' . . . " and therefore, "[A]n analogous application of such standards should not be disregarded." *Id.* at 686 (citations and footnotes omitted). Accordingly, we conclude that adopting the Title VII criteria for purposes of this case is appropriate.

The Sixth Circuit has held that "Title VII . . . should not be construed narrowly." *Tipler v. du Pont de Nemours & Co.*, 443 F.2d 125, 131 (6th Cir. 1971). For purposes of Title VII, the term "employer" "has been construed in a functional sense to encompass persons who are not employers in conventional terms, but who nevertheless control some aspect of an individual's compensation, terms, conditions, or privileges of employment." *Spirit v. Teachers Insurance and Annuity Assoc.*, 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979). *See also EEOC v. Wooster Brush Co.*, 523 F. Supp. 1256 (N.D. Ohio 1981).[4] In this case, defendant PERS does not deny that it is vested with the general administration and management of the Public Employees Retirement System and that it denied plaintiff's application for disability retirement in accordance with the provisions of Ohio Rev. Code § 145.35. Therefore, we conclude that PERS is an employer for purposes of the

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[4] *See Cannon v. State of Delaware*, 523 F. Supp. 341 (D.Del. 1981) (Personnel Commission may be held liable under Title VII as agent of state, responsible for supervising the operation of the merit system); *Hannah v. Teachers' Retirement System*, 26 FEP Cases 527 (S.D.N.Y. 1981) and *Probe v. State Teachers' Retirement System*, 27 FEP Cases 1306 (C.D. Cal. 1981) (State Teachers' Retirement Systems held to be employers of contributors or members for purposes of Title VII.

ADEA because it controls some aspects of plaintiff's compensation, terms, conditions, and privileges of employment.

Accordingly, plaintiff's motion for summary judgment and declaratory judgment (doc. 6) is granted, the cross-motions for summary judgment by defendant PERS (doc. 21) and by defendant HCBMRDD (doc. 26) are denied.

This matter is set for a status conference on May 2 at 3:00 P.M., 1986 to discuss further proceedings consistent with this opinion.

SO ORDERED.

S. Arthur Spiegel
United States District Judge

NO. 86-3676/4034

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUNE BETTS, Plaintiff-Appellee, v. HAMILTON COUNTY BOARD OF MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES, ET AL., Defendants-Appellants (86-3676) Defendant (86-4034), OHIO PUBLIC EMPLOYEES RETIREMENT SYSTEM BOARD, Defendant-Appellant (86-4034).	)	ORDER

BEFORE: MERRITT, Chief Judge; MARTIN and WELLFORD, Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Filed July 5, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1226

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
v.
WESTINGHOUSE ELECTRIC CORPORATION,
Appellant

On Appeal from the United States District Court
for the Eastern Division of Pennsylvania
(D.C. Civil Action Nos. 83-5457 and 84-4799)

Argued October 20, 1987

Decided February 2, 1989

Certiorari Granted October 2, 1989

On Remand from the Supreme Court
of the United States October 2, 1989

Argued on Remand from the Supreme Court
January 16, 1990

Before HIGGINBOTHAM, Chief Judge,
SCIRICA and GARTH, Circuit Judges

(Filed July 5, 1990)

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OPINION OF THE COURT

SCIRICA, *Circuit Judge*.

This appeal arises from an action by the Equal Employment Opportunity Commission ("EEOC") against Westinghouse Electric Corp. based on the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1982 & Supp. V 1987), which prohibits employers from discriminating on the basis of age with

respect to an employee's compensation, terms, conditions, or privileges of employment, *id.* § 623(a)(1). Following a bench trial, the district court found that Westinghouse had willfully violated ADEA through the use of discriminatory severance plans, and enjoined Westinghouse from denying severance pay to retirement-eligible employees. *E.E.O.C. v. Westinghouse Electric Corp.*, 632 F. Supp. 343 (E.D. Pa. 1988). On appeal, we affirmed the district court's determination that the plans violated ADEA but remanded for reevaluation of the finding that Westinghouse had acted willfully. *E.E.O.C. v. Westinghouse Electric Corp.*, 869 F.2d 696 (3d Cir. 1989) ("Westinghouse II"). On October 2, 1989, the Supreme Court vacated our decision and remanded this case for further consideration in light of *Public Employees Retirement System of Ohio v. Betts*, 109 S. Ct. 2854 (1989). *Westinghouse Electric Corp. v. E.E.O.C.*, 110 S. Ct. 37 (1989). Upon review, we hold that our original decision cannot stand in light of the standards announced in *Betts*. We believe that *Betts* has significantly altered the ADEA landscape on employee benefit plans. Therefore, we will reverse the district court's judgment against Westinghouse.[1]

I.

The facts of the case are fully set forth in our prior opinion. In brief, the 1979 Westinghouse severance plan denied severance pay to laid-off employees who were

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[1] Apparently EEOC recognizes the impact of *Betts* because the Commission requested a stay of these proceedings pending action by Congress to reverse *Betts*. By order dated January 3, 1990, we denied the motion.

eligible for retirement. Under the 1982 plan, retirement-eligible employees could elect either severance pay or retirement benefits but not both in the event of a layoff.

In *Westinghouse II*, we held that both plans discriminated on the basis of age in violation of ADEA. 869 F.2d at 699. We concluded that the district court had not erred in finding that under each plan, retirement-eligible employees were treated less favorably than younger employees, and that this less favorable treatment was based on age. *Id.* at 705-09. Moreover, we held that the district court correctly determined that the plans were not part of an integrated company plan to prevent "double-dipping." *Id.* at 707. Thus, Westinghouse had failed to set forth a legitimate, nondiscriminatory justification for the disparate treatment of retirement-eligible employees.

In addition, we held that the plans were not exempt under § 4(f)(2) of ADEA, 29 U.S.C. § 623(f)(2). 869 F.2d at 711. Section 4(f)(2) exempts any bona fide employee benefit plan that is not a subterfuge to evade the purposes of ADEA so long as the plan does not require or permit involuntary retirement.[2] We decided that the severance

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[2] Section 4(f)(2) provides:

It shall not be unlawful for an employer, employment agency, or labor organization –

> . . . . (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any

(Continued on following page)

plans were not part of an integrated employee benefit scheme because, we concluded, severance pay is a fringe benefit, different in purpose from retirement benefits, for which retirement benefits cannot substitute. *Id.* at 710 (citing *E.E.O.C. v. Westinghouse Electric Corp.*, 725 F.2d 211, 225 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984) ("*Westinghouse I*")). Moreover, we found that the plans could not qualify for the exemption because they were not based on age-related cost factors. *Id.* (citing *E.E.O.C. v. City of Mt. Lebanon*, 842 F.2d 1480, 1491 n.9 (3d Cir. 1988), and *Westinghouse I*, 725 F.2d at 224). Thus, we did not reach the question whether the plans constituted a subterfuge. Finally, we remanded to the district court to reconsider the factors it relied upon in concluding that Westinghouse had acted willfully. *Id.* at 714.

In *Betts*, the Supreme Court addressed the question whether the § 4(f)(2) exemption applied to a disability retirement plan that was available only to employees who retired before reaching age sixty. The Court declined to decide the precise meaning of the phrase "any bona fide employee benefit plan, such as a retirement, pension, or insurance plan," found in § 4(f)(2). 109 S. Ct. at 2865 n.6. The Court held, however, that the statutory language does not limit the exemption to "plans in which all

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(Continued from previous page)

> individuai, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual. . . .
>
> 29 U.S.C. Section 623(f)(2) (1982 and Supp. V 1987).

age-based reductions in benefits are justified by age-related cost considerations." *Id.* at 2864-65 (rejecting *Westinghouse I*, 725 F.2d at 224). Moreover, the Court decided that the EEOC regulation, which provides that a plan is "not a subterfuge" only if lesser benefits are justified by age-related cost factors, 29 C.F.R. § 1625.10(d) (1988), was contrary to the plain language of the statute and invalid. 109 S. Ct. at 2863, 2865 (rejecting *Mt. Lebanon*, 842 F.2d at 1489).

The Court reached several conclusions regarding the precise meaning of "subterfuge" in § 4(f)(2). First, it reaffirmed its holding in *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203 (1977), that an employee plan adopted prior to the enactment of ADEA cannot be a subterfuge. 109 S. Ct. at 2861. The Court noted, however, that to the extent a post-ADEA provision of a plan "increased the age-based disparity caused by the pre-Act age limitation, *McMann* does not insulate it from challenge." *Id.* at 2862.

Second, the Court reiterated its statement in *McMann* that " 'subterfuge' means 'a scheme, plan, stratagem, or artifice of evasion,' which, in the context of § 4(f)(2), connotes a specific 'intent . . . to evade a statutory requirement.' " *Id.* at 2863 (quoting *McMann*, 434 U.S. at 203).

Third, the Court noted that a post-Act plan cannot be a subterfuge unless "it discriminates in a manner forbidden by the substantive provisions of the Act." *Id.* at 2865-66. Noting that any benefit plan would violate § 4(a)(1) (employers prohibited from discriminating on the basis of age with respect to compensation, terms, privileges of employment), the Court stated that both

§ 4(a)(1) and § 4(f)(2) could be given effect if § 4(f)(2) is viewed as exempting bona fide benefit plans that are not "a method of discriminating in other nonfringe-benefit aspects of the employment relationship." *Id.* at 2866 (citing 29 U.S.C. § 623(a)(1), (f)(2)). The Court did not define "nonfringe benefit" but its use of the term makes clear that the terms "bona fide employee benefit plan" and "nonfringe benefit" are mutually exclusive. *See id.* at 2864, 2866.

Fourth, the Court stated that § 4(f)(2) does not establish a defense to liability under ADEA; rather, the section "redefines the elements of plaintiff's prima facie case." Thus, an employee who challenges a provision of a benefit plan under ADEA "bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relation." *Id.* at 2868.

II.

The *Betts* Court held that an employee plan adopted prior to the enactment of ADEA cannot be a subterfuge to evade the purposes of the Act. 109 S. Ct. at 2861 (citing *McMann*, 434 U.S. at 203). As a threshold matter, we must determine whether this rule precludes a finding that the challenged provisions of the severance plans were a subterfuge.

ADEA was enacted on December 15, 1967 and became effective in June 1968. *See* Pub. L. No. 90-202, § 15, 81 Stat. 602, 607 (1967). Westinghouse adopted the severance pay plan that excluded retirement-eligible employees in 1960. Effective July 1982, the plan permitted

retirement-eligible employees to choose between severance pay and retirement benefits in the event of a layoff.

Westinghouse contends that the district court erred in its subterfuge analysis because it failed to identify any post-ADEA provision that increased the age-based disparity already present in the challenged plans. EEOC argues that post-ADEA changes in the pension plan expanded the group of retirement-eligible employees.[3] Thus, the group of employees ineligible for full participation in the severance plans has also expanded because the severance plans excluded or limited the participation of retirement-eligible employees. At issue is whether the post-ADEA expansion of the class of retirement-eligible workers "increased the age-based disparity caused by the pre-Act limitation" in the severance plans within the meaning of *Betts*. *See* 109 S. Ct. at 2862. We believe that it does. The factual circumstances of *Betts* and the cases cited therein are instructive.

In *Betts*, the Supreme Court held that a pre-ADEA plan provision, which limited disability retirement benefits to those who retired before reaching age 60, was insulated from challenge as a subterfuge. *Id.* (citing *McMann*, 434 U.S. at 203). The Court noted, however, that

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[3] For example, the 1961 Pension Plan permitted employees to take early retirement after reaching age 60 with 10 years of service. App. at 1792. Under the 1973 Pension Plan, employees between the ages of 55 and 60 with 10 years of service were entitled to early retirement in the case of location closedowns. App. at 1704. By 1979, early retirement was available to employees between the ages of 50 and 60 with 25 years of service when the layoff resulted from job movement or product line relocation. App. at 1599.

the plaintiff had not challenged the plan's age-60 rule but rather a post-ADEA amendment, which guaranteed disabled retirees a minimum of 30% of their final average salary. The Court held that to the extent the amendment increased the age-based disparity, "the automatic rule of *McMann* [was] inapplicable." *Id.* The amendment at issue in *Betts* qualitatively improved the benefits available to those eligible for disability retirement, that is, those retiring before age 60. Thus, the change clearly increased the age-based disparity in available benefits.

In *E.E.O.C. v. Home Insurance Co.*, 672 F.2d 252 (2d Cir. 1982), cited in *Betts*, the EEOC challenged a post-ADEA modification that lowered the mandatory retirement age in the company's pension plan from 65 to 62. The Second Circuit concluded that the existence of a pre-Act plan which arguably complied with ADEA could not "validate the post-Act modification to introduce the new age-discriminatory terms." *Id.* at 259 and n.9. The *Betts* Court also cited *E.E.O.C. v. County of Orange*, 837 F.2d 420 (9th Cir. 1988), in which the EEOC challenged a pre-ADEA pension plan, rather than its post-ADEA amendments. Participation in the plan was limited to public safety employees who were under age 36 when hired. *Id.* at 421. The Ninth Circuit held that post-ADEA amendments, which added juvenile hall counselors to the list of eligible employees and exempted certain law enforcement personnel from the age requirement, did not convert the pre-ADEA plan into a subterfuge. *Id.* at 423 and n.3. According to the court, post-ADEA modifications may convert a benefit plan into a subterfuge only if "significant or at least relevant to the challenged discriminatory practice." *Id.* at 423; *see also E.E.O.C. v. Cargill, Inc.*, 855 F.2d 682, 686

n.4 (10th Cir. 1988) (although plan has been amended since 1967, EEOC does not claim that amendments relate to challenged provisions; amendments do not convert plan into subterfuge).

In this case, EEOC challenges a severance plan provision that went into effect prior to ADEA but was amended in 1982. Westinghouse contends that the severance plan cannot be challenged as a subterfuge because the plan pre-dates ADEA and there have been no post-ADEA changes that increased the age-based disparity. As a preliminary matter, we note that the 1982 modification to the severance plan, which permitted older employees to choose between severance pay and retirement benefits, decreased rather than increased the age-based disparity present in the original plan.

Nonetheless, EEOC contends that post-ADEA changes in the pension plan, under which employees became eligible for retirement at a younger age in certain circumstances, increased the age-based disparity caused by the severance plans. One effect of the changes has been to expand the class of older employees who are ineligible for full participation in the severance plans. We believe that not all modifications which alter the pool of eligible employees will convert a pre-ADEA plan into a subterfuge. A plan provision that changes the pool on a basis unrelated to age is unlikely to increase the age-based disparity caused by the pre-ADEA plan. *See, e.g., County of Orange*, 837 F.2d at 423 and n.3 (amendment adding juvenile hall counselors to list of eligible employees does not convert pre-ADEA plan into subterfuge). In this case, however, the post-ADEA changes in the class of eligible employees are clearly age-based. This

is so, not because the actual number of older employees excluded from full participation in the severance plans has increased, but rather because the modifications have progressively lowered the age at which older employees become ineligible for full participation in the severance plans. We believe that these progressive age-related changes in the pension plan have increased the age-based disparity caused by the severance plans within the meaning of *Betts*. *See Home Insurance Co.*, 672 F.2d at 259 and n.9 (post-ADEA amendments lowered mandatory retirement age from 65 to 62; pre-ADEA plan cannot validate this modification to introduce new age-discriminatory terms).

We do not find it significant in this case that the modifications did not alter the terms of the severance plans directly. The definition of retirement eligibility contained in the pension plan determines whether an employee qualifies for participation in the severance plan. Thus, modifications to the definition directly affect the availability of severance pay. Under the circumstances, therefore, we conclude that the post-ADEA modifications to the pension plan increased the age-based disparity in the severance plans and that the plans may be challenged as a subterfuge to evade ADEA.

III.

Even though we believe the Westinghouse plans may be challenged, we find that under the standards announced in *Betts*, the plans qualify for the exemption

for "any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [ADEA]," 29 U.S.C. § 623(f)(2). It is not disputed that Westinghouse observed the terms of the plans and that the plans are "bona fide" in that they exist and pay benefits. *See Betts*, 109 S. Ct. at 2860.

The Supreme Court declined to define the precise meaning of "bona fide employee benefit plan such as a retirement, pension, or insurance plan." *Id.* at 2865 n.6. The Court stated, however, that the inclusion of the terms "retirement, pension, or insurance" suggests an enumeration rather than an exclusive listing of plans that qualify for the exemption. *Id.* at 2864. The Court rejected the "age-related cost factor" test, upon which we relied in *Westinghouse II* to distinguish exempt plans, reasoning that the costs of many plans that fall within the listed categories do not increase with the age of the employee, citing defined contribution pension plans as an example. *Id.* The Court noted that a Department of Labor regulation, defining an employee benefit plan as one "which provides employees with what are frequently referred to as 'fringe benefits,' " was broad enough to encompass a variety of fringe benefits, regardless whether the cost of those benefits increased with age. *Id.* (quoting 29 C.F.R. § 1625.10(b) (1988)). Moreover, the Court stated that "Congress left the employee benefit battle for another day, and legislated only as to hiring and firing, wages and salaries, and other nonfringe-benefit terms and conditions of employment." *Id.* at 2866.

Unlike wages and salaries, which are contingent on job performance, severance pay is linked to an employee's length of service and the occurrence of a layoff.

Companies establish severance plans to provide short-term financial assistance during the transition period following layoff. Severance plans are available as a benefit to employees who remain with the company for a specified period. *See Westinghouse II*, 869 F.2d at 707. In light of the broad definition of "bona fide employee benefit plan" endorsed by the Court in *Betts*, we must conclude that the plans may qualify for the § 4(f)(2) exemption so long as they are not intended as a subterfuge to avoid the purposes of ADEA.[4]

Prior to *Betts*, this court had held that the employer had the burden of disproving subterfuge by demonstrating that age-related cost factors required reduced benefits for older workers. *See Mt. Lebanon*, 842 F.2d at 1490. In *Betts*, however, the Supreme Court rejected the cost-justification requirement, 109 S. Ct. at 2863-64, and held that an employee who challenges a plan provision as a subterfuge has the burden of proving that the provision "actually was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relation." *Id.* at 2868.

EEOC contends that the severance plans discriminated against older workers with respect to recall and transfer rights,[5] and required older workers to retire

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[4] We note that EEOC has not argued against a designation of the severance plans as "bona fide employee benefit plans" in its brief or at oral argument.

[5] Neither party contests the designation of recall and transfer rights as nonfringe benefits. In light of our ultimate decision, we assume without deciding that the parties are correct.

involuntarily. EEOC suggests that remand to the district court may be necessary to permit full development of the record on these issues in light of the standards announced in *Betts*. Westinghouse argues that the district court ruled against EEOC on recall rights and involuntary retirement and that further consideration of those claims is now barred because EEOC failed to appeal or cross-appeal from the judgment.

In its amended complaint, EEOC claimed that Westinghouse violated ADEA by, among other things, "forcing laid off employees to retire prior to age 70 because [severance pay] was not available," and "denying recall to work to employees who were laid off and forced to retire." Second Amended Complaint, ¶ 7. The district court found that EEOC's claims implicated eight Westinghouse employment plans and practices. 632 F.Supp. at 351.[6] The court "uph[e]ld the Westinghouse practices, other than denial of severance pay," *id.* at 350, and entered judgment

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[6] As viewed by the district court, the eight challenged practices were:

(1) pre-July, 1982, arrangements for pensions and layoff income benefits, (2) post-July, 1982, arrangements for pensions and layoff income benefits, (3) arrangements for management employees, (4) Advanced Retirement Plan I, (5) Advanced Retirement Plan II, (6) an "impact number" process of awarding special benefits to certain employees laid off as a result of location shutdowns, product line relocations, or job movements, (7) limitation of retirement benefits to those actually eligible at time of layoff, and (8) limitation of death prior to retirement benefits to spouses of employees actually eligible for the benefits at the time of death.

632 F. Supp. at 351.

in favor of plaintiff and against defendant on the [severance plan] issues and in favor of defendant and against plaintiff on the other claims. . . . " *id.* at 373. It seems to us that the recall rights and involuntary retirement claims, as set out in the complaint, have their basis in the allegedly discriminatory application of the severance plans. Thus, to the extent that the district court ruled in favor of EEOC on the severance plan issues, it can hardly be said that the judgment constituted a ruling against EEOC on those claims. By enjoining Westinghouse from denying severance pay to retirement-eligible workers, *see id.*, the district court effectively eliminated the basis upon which recall rights allegedly were denied and older workers allegedly were forced to retire. Similarly, in ruling "against plaintiff on the other claims," we think the district court was merely reiterating its decision to uphold the other challenged Westinghouse practices. Therefore, we do not believe that EEOC should now be penalized for failing to appeal a judgment, which in relevant part, favored it.

Although we find that EEOC is not barred procedurally from asserting its claims, we do not believe that remand to the district court is necessary.[7] For reasons we will now discuss, we find that the evidence presented at

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[7] EEOC contends that "[f]oreclosing the Commission from advancing these arguments in its favor would create a serious issue as to whether *Betts* should be applied retroactively to Westinghouse's plans under the three-part test developed in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971)." We agree that EEOC is entitled to argue its case in light of the standards announced in *Betts* and we have considered each of EEOC's arguments in turn.

trial is sufficient to establish that the severance plans did not discriminate against older workers with respect to recall or transfer rights. Moreover, we hold that Congress did not intend the prohibition against involuntary retirement contained in § 4(f)(2) to apply to the facts presented in this case.

Westinghouse contends that all laid-off employees had recall rights and that only those who terminated their layoff status – by choosing to receive pension pay or immediate lump sum severance pay – lost their right to be recalled to work.[8] A younger laid-off employee could lose recall rights by choosing immediate lump sum severance. Thus, according to Westinghouse, the severance plans did not discriminate against older employees with respect to recall rights.

Prior to 1982, retirement-eligible employees were excluded from participation in the severance plan. Therefore, they could maintain recall rights only by foregoing all income during layoff. Under the 1982 plan, retirement-eligible employees could chose between severance pay and retirement benefits. Thus, recall rights were available to those who chose severance pay, although possibly at the expense of vested early retirement benefits. *See Westinghouse II*, 869 F.2d at 708 n.18 ("It is not clear that upon

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[8] Under the Westinghouse plans, laid-off employees who were eligible to receive severance pay could choose from among three options: 1) lump sum payment, elected within sixty days of layoff; 2) weekly severance payments; and 3) lump sum payment after twelve months. Employees who chose the first option terminated their relationship with Westinghouse and gave up the right to be recalled. App. at 1805-06; 1278-79.

recall the older employee, like the younger employee, retains the option to elect early retirement").

We recognize that the options available to older employees were less desirable than the options available to younger employees, who could maintain recall rights without sacrificing present income or vested retirement benefits. After *Betts*, however, this is not the focus of the subterfuge inquiry. The severance plans could not have been a subterfuge for purposes of § 4(f)(2) unless Westinghouse intended the plans to discriminate against older workers with respect to a nonfringe benefit. *See Betts*, 109 S. Ct. at 2868. In this case, we need not determine Westinghouse's intentions because implementation of the severance plans was not coupled with the elimination or reduction of recall rights. *See id.* ("[A]n employer's decision to reduce salaries for all employees while substantially increasing benefits for younger workers might give rise to an inference that the employer was in fact utilizing its benefit plan as a subterfuge for age-based discrimination in wages. . . . "). At all relevant times, recall rights were available to all those on layoff, including older workers. The severance plans did not affect these rights. Only the affirmative action of any employee to terminate the employment relationship – in the case of older employees, by accepting retirement, in the case of older or younger employees, by accepting immediate lump sum severance pay – eliminated the employee's right to be recalled.

Similarly, the severance plans did not affect a laid-off employee's opportunity to transfer to another plant. According to EEOC, the collective bargaining agreements between Westinghouse and the unions provided that

open jobs could be filled through transfers in accordance with policies negotiated at the local level. Even if older workers were treated less favorably with respect to transfer rights, as EEOC suggests, we cannot say that implementation of the severance plans brought about this result. The discriminatory impact of the severance plans lies in the total exclusion or limited participation of older workers. After *Betts*, these factors cannot prevent Westinghouse from qualifying for the § 4(f)(2) exemption. Therefore, we hold that neither the 1979 plan nor the 1982 plan, which permitted retirement-eligible employees to choose between retirement benefits and severance pay with recall rights, constituted a subterfuge to evade ADEA because the plans did not discriminate with respect to a nonfringe-benefit aspect of the employment relationship.[9]

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[9] Judge Garth agrees with the court's conclusion that neither the 1979 plan nor the 1982 plan constituted a subterfuge to evade ADEA, and thus, he is in complete accord with the discussions and holding of the court's opinion. However, he would emphasize as well that no violation of the ADEA occurred because Westinghouse afforded an option to every retirement-eligible employee, whereby an employee could choose between participating in Westinghouse's retirement plan or participating in Westinghouse's 1982 severance plan, which included recall or transfer rights. Hence, Westinghouse did not even indirectly require any older (retirement-eligible) employee to take retirement. An employee could, instead, opt for severance with recall or transfer. Absent that option, in Judge Garth's opinion, the plans in this case might have been challenged. Moreover, Judge Garth stresses that *Public Employees Retirement System of Ohio v. Betts*, 109 S. Ct. 2854 (1989) addresses only *non-fringe* rather than *fringe* benefits, such as Westinghouse's 1982 severance plan.

Section 4(f)(2) provides that an employee benefit plan that is not a subterfuge to evade ADEA is exempt, except that "no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual." 29 U.S.C. § 623 (f)(2). Congress added this prohibition to § 4(f)(2) in 1978, Pub. L. No. 95-256, Section 2, 92 Stat. 189, in response to a Bureau of Labor Statistics study which revealed that 41% of the workers covered by private pension plans were subject to mandatory retirement provisions. See S. Rep. No. 493, 95th Cong. 2d Sess. 9, *reprinted in* 1978 U.S. Code Cong. & Admin. News 504, 512. Congress concluded that raising the upper age limit under ADEA from 65 to 70 "would be an empty gesture if employees remained subject to mandatory retirement because of provisions contained in collective bargaining agreements or employee benefit plans." *Id.*

The Westinghouse plans do not contain mandatory retirement provisions. EEOC contends, however, that the options available under the plans left retirement-eligible employees with no real choice other than retirement, and that this amounted to constructive discharge. Westinghouse claims that the plans permitted older employees to choose between lawful options: under the 1979 plan, retirement or unpaid layoff with recall rights; under the 1982 plan, retirement or severance pay with recall rights. Thus, according to Westinghouse, the plans did not permit or require involuntary retirement.

We do not believe that Congress intended § 4(f)(2) to reach circumstances like these where laid-off employees had the option to forego retirement and remain with the

company on layoff while awaiting recall.[10] *Cf. Bodnar v. Synpol, Inc.*, 843 F.2d 190, 193 (5th Cir.) (employer's offer of early retirement may create prima facie case of age discrimination if it sufficiently alters status quo that each choice facing employee makes him worse off than he was before offer), *cert. denied*, 109 S. Ct. 260 (1988). Rather, we think § 4(f)(2) proscribes the use of employee benefit plans as a means of forcing older workers off the job. *Cf. Henn v. National Geographic Society*, 819 F.2d 824, 826 (7th Cir.) (existence of early retirement plan does not violate ADEA provided an employee on the job may decline offer and continue to work), *cert. denied*, 484 U.S. 964 (1987). The choice between retirement and unpaid layoff does not constitute involuntary retirement where, as here, continued work was not an option for any of the affected employees, and the employee's layoff status was unrelated to age.[11] *Cf. id.* at 829 (pressure to choose between

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[10] According to Westinghouse, the choice between retirement and layoff was a viable one. Westinghouse points out that the charging party in this case, Charles Slackway, opted to remain on unpaid layoff with recall rights rather than retire. We express no opinion on this matter.

[11] Our decision in *Coventry v. United States Steel Corp.*, 856 F.2d 514 (3d Cir. 1988), cited by EEOC, is inapposite. In that case, an employee was required to sign a waiver of his rights under ADEA in order to receive early retirement benefits. We noted that the employee was presented with "little more than a 'Hobson's choice,' " he could either sign the waiver to receive benefits or face unpaid layoff. *Id.* at 524. The issue was whether and under what circumstances an employee's decision to waive ADEA rights was voluntary, *id.* at 517, not whether exclusion from participation in a severance plan, which left laid-off employees with the choice of retirement or continued layoff, required or permitted involuntary retirement.

retirement and continued employment does not make choice involuntary unless terms on which employee would remain on job constitute a violation of ADEA). Nor do we believe that exclusion from the severance plan caused older employees to retire. Those who retired did so because they were laid off.[12] Moreover, after 1982, retirement-eligible employees could choose between retirement benefits and severance pay with recall. We believe that a plan which provides laid-off employees with such a choice cannot be said to require or permit involuntary retirement within the meaning of ADEA.

EEOC suggests that Westinghouse misled older workers about their options and pressured them to choose retirement benefits over severance pay with recall. Although such conduct by Westinghouse, if proven, might constitute a violation of ADEA, it does not demonstrate that the terms of the severance plans required or permitted involuntary retirement.

IV.

Having concluded that Westinghouse is exempt from liability under § 4(f)(2) of ADEA, we will reverse the judgment entered by the district court against Westinghouse and remand to the district court with the direction that the district court enter judgment in favor of Westinghouse on all EEOC claims. Each side to bear its own costs.

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[12] EEOC has not contended, in its amended complaint or in its brief to this court, that the decision to layoff employees was related to age.

A. LEON HIGGINBOTHAM, JR., *Chief Judge*, concurring in part and dissenting in part.

I join in Parts I and II of the majority opinion. I also agree, albeit more reluctantly, that *Public Employees Retirement System of Ohio v. Betts*, 109 S.Ct. 2854 (1989), compels the conclusion that severance plans are "bona fide employee benefit plans." Thus, I join in majority's Part III discussion of that issue. I also join in my colleagues' rejection of Westinghouse's argument that the EEOC did not preserve the recall and transfer argument, and in their holding that the plans did not permit or require "involuntary retirement" within the meaning of 29 U.S.C. § 623(f)(2).

However, I must respectfully dissent on one point. Unlike my colleagues, I believe that there are genuine material issues as to whether the plans discriminated against older workers with respect to recall rights – which I believe is a valuable "nonfringe benefit" under *Betts* – and, if so, whether the plans are a subterfuge to evade the purposes of the ADEA. As the majority acknowledges, the options available to retirement – eligible employees under the plans were "less desirable" than the choices available to younger employees, who could maintain recall rights without sacrificing either present layoff income benefits or vested retirement benefits. Thus, compared to their younger colleagues, older workers had a financial disincentive to retain their recall rights. For at least some older workers, this economic disincentive under the plans may have been so great that they felt compelled to take early retirement and forgo their recall rights, rather than forgo present income from their employer.

As I understand the majority's reasoning, the court holds that the fact that the right to recall was *available* to both younger and older workers is sufficient, under *Betts*, to conclude that severance plans do not discriminate against older workers, within the meaning of the ADEA. I do not read the Supreme Court's decision as requiring such a narrow view of discrimination. In *Betts*, the Court stated as an example of a practice giving rise to an inference of subterfuge "an employer's decision to reduce salaries for all employees while substantially increasing benefits for younger employees." 109 S.Ct. at 2868. To me this language supports the view that to the extent that Westinghouse's severance plans provide economic incentives only to younger employees, the plans may still be actionable under the ADEA.

As the majority notes, a retirement-eligible employee would lose recall rights only through his or her "affirmative action to terminate the employment relationship, through accepting retirement or immediate lump sum severance pay." Maj. Op. Typescript at 19. However, I do not believe that the employees' "affirmative action" in this regard is sufficient to shield their employer from liability under the ADEA. If the older employees' decision to terminate the employment relationship was encouraged by "affirmative," intentional action on the part of the employer in the structuring of its severance plans, then it may be, as the EEOC alleges, that the plans constituted "a subterfuge for ridding Westinghouse's workforce of older workers through the discriminatory denial of recall." EEOC Supp. Brief. at 32.

The majority is clearly correct in noting that *Betts* "has significantly altered the ADEA landscape on

employee benefit plans." Maj. Op. Typescript at 4. It also cannot be disputed that the litigation challenging Westinghouse's pension and severance plans has consumed too many years and too many dollars. However, in my view, fairness to the parties dictates that the matter be remanded to the district court, which is the proper forum to determine whether – even in the more barren ADEA landscape – the plans actually discriminated on the basis of age and, if so, whether they were a subterfuge for evading the purposes of the ADEA. A remand would give both sides an opportunity to put on evidence, in view of *Betts'* new standards about the actual effect of the severance plans on the workforce in the affected plants, and Westinghouse's motivations for adopting these plans.

A True Copy:

Teste:

Clerk of the United States Court of Appeals

for the Third Circuit